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REPORTS

OF

CASES DECIDED

IN THE

HIGH COURT OF CHANCERY

OF

MARYLAND.

BY THEODORICK BLAND,
CHANCELLOR.

VOL. III.

BALTIMORE:
CUSHING & BROTHER.

1841.

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THOMAS S. ALEXANDER—appointed 10th March, 1826—resigned 1833.

ALEXANDER RANDALL—appointed 18th September, 1833—resigned 1840.

CORNELIUS McLEAN—appointed 29th October, 1840.

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CASES DECIDED
IN THE
HIGH COURT OF CHANCERY
OF MARYLAND.

WALSH *v.* SMYTH.

No injunction can be granted to stay proceedings at law between the same parties, without bond and surety, by the plaintiff in equity to the plaintiff at law, to prosecute the suit in equity with effect. Where the suit abates by the death of the plaintiff, the injunction not being thereby dissolved, a dissolution can only be obtained by notice to the representatives of the deceased; or, if they are non-residents, or unknown, by notice entered on the docket; or in a course of proceeding between the surviving parties, the suit not having been noticed for some time by the representatives of the deceased.

Where in pursuance of a contract for the sale of land, several bonds were given for the payment of the purchase money, they were regarded as one contract; and the consideration, on being impeached, having been sustained in favour of a responding defendant, it was *held*, to enure to the benefit of a defendant against whom, for not answering on warning by publication, the bill might have been taken *pro confesso*. But although as regards an inseparably joint cause of suit, a good defence by one defendant must enure to the benefit of all; yet, as regards plaintiffs, where there is a ground of relief available for all, the neglect of any one to take advantage of it, will not prevent any others of them from benefiting by it.

The nature of an amended bill; how leave to amend may be obtained; and in what manner the amendment should be made. On an application for a rehearing, it is not enough to shew that injustice has been done, but that it has been done under circumstances which authorize the court to interfere. The prayer of the petition for a rehearing can be no farther regarded than as it may injuriously affect the interests of the petitioner.

THIS bill was filed by *Robert Walsh* and *Stephen Casenave* against *Thomas Smyth, Jr.* *John Blanton*, *John F. Gardner*, *Freeman Lewis*, *Thomas Gilbert*, *Benjamin Chew*, *John Heathcote*, *James Dall*, *Isaac Wikoff*, *James Clayland*, *William Cox*, *Joseph Anthony and Son*, and the heirs of *John Lynch*.

The bill states, that *Smyth* and *Lynch*, pretending to be entitled to a large quantity of land in the state of Georgia, their title to which, they represented to be wholly unencumbered, and also

represented it to possess great advantages of water and navigation, and to be situated in an increasing, populous and wealthy country; and as evidences of the truth of those representations as to title, quality, and situation, they exhibited to these plaintiffs a plot of a tract said to contain seventy-two thousand seven hundred and fifteen acres of land on Tooglo river, purporting to have been surveyed for *Thomas Gilbert*; one other plot of two adjoining tracts of land, the one said to contain sixty thousand acres, granted to *John Blanton*, on the 24th day of March, 1794, and the other said to contain sixty thousand acres, granted to *Freeman Lewis*, on the same day; and a third plot representing a tract of land surveyed for *John F. Gardner*, and granted on the 21st of March, 1794, twenty-one thousand acres of which in his name, and the remaining part in the name of *Thomas Gilbert*, granted — day of —, 1795. A paper purporting to be an affidavit made before a justice of the peace in Georgia, on the 18th of April, 1794, by a person named *Samuel Hollingsworth*, stating that he was a chain-carrier on a survey of lands laid out for *Blanton* and *Lewis*, which he believed were vacant at that time. A paper purporting to be a certificate given by *Thomas Gilbert*, on the 22d of August, 1794, stating, that he had surveyed twenty-one thousand acres for *John F. Gardner*, on the 1st of August, 1793, in Franklin county, and that he believed the whole to be clear of elder surveys, and the greater part to be of excellent quality; and another paper purporting to be a certificate bearing date on the 26th of April, 1794, from *Peter Crawford*, clerk of Columbia county, Georgia, stating, that *John Blanton* had resided several years in that county, and that there never had been any judgment entered up, execution issued, or mortgage recorded in that county, against him or *Freeman Lewis*.

The bill further states, that to obviate all difficulty, *Smyth* and *Lynch* offered to guarantee the title of the lands and to deliver possession to the plaintiffs. Whereupon, the plaintiffs, on the 10th of July, 1794, contracted with *Smyth* and *Lynch*, for the purchase of all the lands mentioned in the said three plots, containing, in the whole, two hundred and seventeen thousand one hundred and fifty acres, on the following terms, that is to say: that grants for three tracts of the said land described on *Thomas Gilbert's* plot, which had not been obtained, should be procured by them; as also for four tracts described on *John F. Gardner's* plot; that the whole of the said lands should be conveyed; and a resurvey

thereof made at the expense of *Smyth* and *Lynch*; that on the said conditions the plaintiffs should pay the sum of ten thousand pounds, in the manner following, to wit: two thousand pounds immediately in goods; seventeen hundred and fifty pounds in ninety days, from the 10th of July, 1794; one-fourth of the balance of the whole sum at the end of one year; one other fourth at the end of two years; one other fourth at the end of three years; and the remaining fourth at the end of four years from that day, with interest on each sum if not paid when due. In pursuance whereof the said lands were conveyed unto the plaintiff *Robert Walsh*; and *Smyth* and *Lynch* executed a bond, conditioned, that the said lands should be resurveyed and possession delivered at their expense; and the plaintiffs accordingly paid the sum of three thousand seven hundred and fifty pounds, in money and goods, agreeably to their contract; and on the 11th of July, 1794, executed bonds to the defendant *Smyth*, in his own name, securing the payment of the balance of the purchase money in the manner above mentioned; and have since paid six hundred and five pounds fourteen shillings and three pence half penny, in part discharge of the sum due on the first instalment, for which they received no credit.

The bill further states, that the plaintiffs employed a certain *Jared Bull* to go to Georgia, to inquire as to the title and quality of the lands, who obtained information that the lands described in the plot to *Blanton* and *Lewis*, and that described in the plot to *Gardner* and *Gilbert*, in virtue of certain warrants issued out of the land court of Washington county, were not so granted; but were fraudulently obtained upon forged warrants, as the plaintiffs presume, from a certificate of the clerk, that no such warrants had ever been issued from the said court; and that such parts of the said lands as were within Franklin county had been surveyed five or six years prior to the grants under which *Smyth* and *Lynch* claimed; and the whole were held and owned by divers citizens under lawful titles. That seventy thousand acres of the land in the said plot surveyed for *Gilbert*, was within the Indian territory; and being beyond the line between the whites and Indians, no valid grant of it could be made by Georgia, without the assent of the United States, which had not been obtained; and that the residue thereof, lying within Franklin county, had been surveyed and granted to divers citizens many years before the title under which *Smyth* and *Lynch* claimed. That the said *Smyth* and *Lynch*,

in dealing with the plaintiffs, represented themselves as the only owners or persons having any interest in the said lands, when, in truth, they were concerned with the said *John F. Gardner, Freeman Lewis, John Blanton, Thomas Gilbert, James Clayland, and William Cox*, all of the state of Georgia, who well knew the insufficiency of the title to the said lands, and were concerned as land speculators, with a view to raise money fraudulently by the sale of lands for which they could make no good title. That on the 26th of December, 1795, one hundred and forty-one thousand acres of lands described in the said plots had been seized and sold for the sum of seventy-eight dollars of public taxes due to the state, at the time of the sale to these plaintiffs; and that the defendant *William Cox*, who now holds the said lands, as purchaser at the said sale for taxes, refuses to relinquish the same to these plaintiffs for less than eighteen hundred dollars; and that the said defendant *Smyth* has since purchased under sales made by tax collectors, the whole of the said lands at a price less than two hundred pounds; and holds and claims the same as his own property.

The bill further states, that the defendant *Smyth* had assigned agreeably to the act of Assembly unto the defendant *Chew*, three of the bonds executed to the plaintiffs for the purchase money, one conditioned for the payment of five hundred pounds, and the others for seven hundred and fifty pounds each, who had commenced suit and obtained judgment on the first mentioned bond, and was proceeding for the recovery of the others; and endorsed and delivered over unto the defendants *Heathcote* and *Dall*, one other of the said bonds, who had, in the name of the defendant *Smith*, commenced suit for their use, and obtained judgment thereon; and had also endorsed and assigned one other of the said bonds to the defendant *Wikoff*, and unto *Hugh McCurdy*, who endorsed the same to *George Salkeld*, who endorsed the same to the defendants *Joseph Anthony & Son*, by whom suit had been instituted for the recovery thereof (*); and the said defendants *Smyth, Heathcote* and *Dall, Chew, Wikoff* and *Joseph Anthony & Son*, demand payment and threaten to take out execution; and that the said *John Lynch* departed this life about the year 1796, leaving two children, one of whom is since dead, an infant without issue; and the other, whose name is unknown, resides in Ireland.

Whereupon it was prayed that the contract might be set aside, and the money paid by the plaintiffs refunded to them, that they might be further and otherwise relieved agreeably to equity and

good conscience, and that a writ of injunction might be issued to restrain the defendants from proceeding at law.

This bill was sworn to by the plaintiff *Walsh*, on the 27th of July, 1797, and soon after laid before the Chancellor.

29th July, 1797.—HANSON, *Chancellor*.—Injunction cannot issue until a bond to each of the parties to be enjoined, &c. shall have been filed. (a)

After which the bill, as appears by an endorsement on it, was filed on the first of August, 1797, and on the next day there were filed five separate injunction bonds, given by the plaintiff *Robert Walsh* alone, with two sureties to those stated in the bill, as it then stood, to be the several holders of the bonds for the purchase money. These injunction bonds were inclosed in a letter to the Register, from the plaintiff's solicitor, in which he says, 'I believe the securities are sufficient.' It does not appear, that they were by any note or writing approved by the Chancellor; but the injunction was immediately issued, and on the same day served on the clerk of the General Court, in which court the judgments had been recovered, or the suits were then depending.

There does not appear to have been any petition or written application to amend the bill, but upon the docket there is this entry, 'December term, 1798, leave to amend bill by adding parties, amended bill filed.' There was, however, in fact, no separate amended bill ever filed; but instead thereof, the original bill was amended by making sundry interlineations, and then it is certified at the end of it, that 'on the 19th December, 1798, *Robert Walsh* made oath, that this bill, as amended, is true to the best of his knowledge, *Samuel Harvey Howard*.'

There appears to have been several interlineations made in the original bill; but, from the hand-writing of all, as well as from the nature of some of them, it is difficult to determine whether they are to be considered as mere corrections of the first draft of the bill, made before it was submitted to the Chancellor, or as amendments made under the leave. On advertng to the day of filing the bill, and on comparing the original bill itself with the writ of injunction, in which the name of *Richard Emory* is not mentioned, it appears, that the following interlined sentence, 'and hath also endorsed and assigned one other of the said bonds, conditioned for the payment

(a) *Williams v. Hall*, 1 Bland, 194, note; *Billingslea v. Gilbert*, 1 Bland, 566.

of seven hundred and fifty pounds, unto a certain *Richard Emory*, who hath commenced suit in his own name, as assignee of the said *Smyth*, and at October term, in the year seventeen hundred and ninety-eight, recovered judgment thereon against your orator in the Western Shore General Court,' inserted after the words, 'for the recovery thereof' (*); and also the insertion of the name of *Richard Emory* in the prayer for the injunction, and in other parts of the bill, as a new party, are to be regarded as amendments under the leave. But it does not appear, that an injunction bond to *Emory* was ever filed, as was required in favour of the other defendants; or, that any writ of injunction was ever issued against him.

An order of publication was passed on the 12th of May, 1800, in the usual form, warning all the defendants who were therein stated to be non-residents of the state, to appear and answer. The proof of the publication of this order was made by producing the newspapers themselves.

On the 6th of January, 1802, *Thomas Smyth*, *James Clayland*, and *Benjamin Chew*, filed their several answers, in which *Smyth* and *Clayland* specially and particularly deny all the allegations of defect of title, of fraud, forgery and misrepresentation, as charged in the bill; and *Chew* states, that he had no knowledge of the contract respecting the lands; that the bonds he held were assigned to him for a valuable consideration; and that they were represented as free from abatement, and that the whole money was truly due.

Isaac Wikoff, on the 4th of August, 1804, filed his answer, in which he states, that he had no knowledge of the contract between the plaintiffs and *Smyth* and *Lynch*; that the bond he held, had been assigned to him for a valuable consideration, and that the money secured by it was then truly due. This answer was sworn to before the Mayor of the city of Philadelphia, and certified under the seal of the city.

On the 20th of December, 1804, a notice of motion to dissolve the injunction was entered on the docket, which at October term, 1805, was enlarged to that term. At February term, 1807, it was *Ordered*, that a commission issue to Georgia on striking commissioners. An agreement was filed on the 14th of April, 1807, not now to be found among the papers, and a commission issued by consent to *Peter Lasly* and *Thomas P. Carnes*, or either of them. At December term, 1810, Rule further proceeding by the fourth day of next term, or the bill to be dismissed. At February term, 1811, the injunction was ordered to be dissolved *nisi* 18th March.

On a letter from the solicitor of *Walsh* asking a postponement, the Chancellor on the 16th March, 1811, says, 'The Register is directed not to certify the dissolution of the injunction until further order.' July term, 1820, petition filed, order for commission *nisi* 22d of March, 1821, when a commission issued to complainants' commissioners.

The death of *Richard Emory* having been suggested on the 21st of October, 1825, his executor *Thomas L. Emory* was made a party defendant, who on the 15th of December, 1825, filed his answer, in which he states, that he had no knowledge of the contract between the plaintiffs and *Smyth* and *Lynch*; which he believes, however, to have been in all respects fair; that the bond held by him had been assigned to his testator for a valuable consideration; and that no part of the judgment he had obtained on it had been paid.

On the 24th of December, 1825, an order of notice of motion to dissolve the injunction in the usual terms was passed. On a petition filed on the 16th of November, 1826, by the complainants, it was *Ordered*, that a commission issue to the complainants' commissioners *Thomas Russel*, *James B. Latimer*, *J. Spear Nicholas*, and *Robert Wilson, Jr.*, unless the defendants name and strike on or before the 27th of November, 1826. On the 28th of December, 1826, a commission was issued accordingly. A commission was issued on the 17th of February, 1830, to take testimony on the part of the plaintiffs, which was returned and filed on the 6th of March, 1830. *Jared Bull*, the only witness examined, stated, that in the year 1794, he went to Georgia as agent for the plaintiffs to examine and enquire into the title, situation and quality of the lands so purchased by them; that he could find no such warrants for some of the lands as represented by the vendors; that some of the lands were held by others under elder patents; and that other parcels of the lands were within the Indian territory.

6th September, 1830.—BLAND, Chancellor.—This case standing ready for hearing, and having been submitted on notes by the solicitors of the parties, the proceedings were read and considered.

It is clear, that the purchase of the lands, which was the consideration of the several bonds, held by the defendants, must be taken as one entire and indivisible contract; although the bonds themselves are several, and have, for a valuable consideration, been assigned to and are now held by several distinct assignees. Consequently, if the consideration of those bonds is to be deemed a valid support for any one, it must, in like manner, be taken as a

sufficiently legal foundation to sustain them all; and that too, notwithstanding the default of the holders of any others of them in not answering as warned by the order of publication. The power of the court to take the bill *pro confesso* for the benefit of the plaintiff, upon a defendant not answering after a constructive notice by publication, must be taken to be subject to the nature of the case, and at its discretion; for otherwise, if the court was bound, as in a case of this kind, to take the bill *pro confesso* as against an absent defendant who had failed to answer, then it might be compelled to pass a contradictory decree; to say, that as against one defendant the consideration of a bond was legal and valid; and yet as against another, that the same consideration was corrupt and utterly worthless. It is certain that peculiar circumstances, in a case like this, where the bonds had passed into the hands of several distinct assignees, might have given to the plaintiffs a separate ground of relief against one assignee which would not be of any avail against the holders of the other bonds. But here it is manifest, that all the bonds having the same common consideration, that consideration must be impeached as to all, or be allowed to stand as a legal support for all.

In this case some of the defendants have answered and others have failed to answer after publication; and all the allegations of the bill which would, if admitted or established, entitle the plaintiffs to the relief they ask, have been denied by the answers of the responding defendants, and have not been sustained by the proofs; therefore, as to them, that consideration which is common to all the bonds remains valid and unimpeached. But the same consideration cannot be deemed valid in favour of one as to the whole purchase money, and utterly invalid as regards another claimant, who rests his pretensions altogether upon the same consideration. Hence, as this consideration has been sustained by the responding defendants, it must be deemed valid as to all, although the bill might, in other respects, have been taken *pro confesso*, as against those who have not answered, and therefore the plaintiffs can obtain relief against none of these defendants. (b)

(b) *Lingan v. Henderson*, 1 Bland, 236.

DORSEY v. DORSEY.—The bill stated, that Edward Dorsey had given his bond to Ely Dorsey for the payment of £42 15s. 1d.; that the bond was lost; that the claim had been assigned to the plaintiff; that the obligor was dead; that his personal estate had been exhausted in the payment of his debts; and that he had devised his real estate to the defendants, in whose hands the bill prayed that the real assets

Whereupon it is *Decreed*, that the injunction heretofore granted in this case, be, and the same is hereby dissolved. And it is further *Decreed*, that the said bill of complaint, be, and the same is hereby dismissed with costs, to be taxed by the register.

John Glenn, as administrator *de bonis non* of *Stephen Casenave*, deceased, by his petition filed on the 24th of September, 1830, on oath, stated, that *Stephen Casenave*, one of the plaintiffs, died, and administration of his personal estate was granted by the Orphans Court of Baltimore, to *James Walker*, who died sometime about the year 1810; that at October term, 1798, the death of *Stephen Casenave* was suggested, and entered upon the docket, which entry was continued until 1814, when it was first omitted, and does not afterwards appear among the docket entries in the several continuances of the case; but that the name of *Stephen Casenave* appears in all the continuances of the case on the docket, and in all the answers and proceedings, where the title of the action is set forth, as one of the existing plaintiffs. That the petitioner on the 23d day of September, 1830, obtained letters of administration *de bonis non*, of all the goods, chattels and credits which were of the late *Stephen Casenave*. That the defendants *Thomas Smyth*, *John Heathcote*, *James Dall*, and *James Clayland*, are also dead; but no suggestion or other notice of the death of any of those defendants was made in the case, nor any process issued or proceeding had to make their representatives parties, or to make the representatives of the plaintiff *Casenave* parties; and that the court thus remained wholly uninformed of the death of the plaintiff *Casenave*, and of those defendants, while sundry proceedings were had to bring the case to a final hearing; and it was submitted for decision before full and competent testimony in support of the equity set forth in the bill was obtained.

might be charged with the payment of his debts. Some of the heirs answered, as to all of whom, upon the hearing, the bill was dismissed.

22d January, 1800.—HANSON, Chancellor.—As to the defendant Deborah Dorsey, executrix of Edward Dorsey, who has been regularly summoned, and stood out the process of attachment, and attachment with proclamations, and failed to appear and answer agreeably to law, the Chancellor is by law to take, and the bill is hereby taken *pro confesso*. And this case shews plainly the impropriety of directing the Chancellor absolutely to take any bill *pro confesso*. But inasmuch as the bill states, that the personal estate of the testator is exhausted, it does not appear, that the complainant can have any benefit from the said taking; and the Chancellor being authorized to decree what appears just; (1785, ch. 72, s. 19.) It is *Decreed*, that the bill as to Deborah Dorsey be, and the same is hereby dismissed, &c.

The petition further stated, that the dissolution of the injunction, by enabling the surviving defendants to issue executions at law on the judgments rendered more than thirty years ago, which have been levied on lands whereof the plaintiffs in the bill, or one of them, were or was seized at or since the time of their rendition, and long since sold for a valuable consideration to *bona fide* purchasers without actual notice, would cause great and irreparable injury to such purchasers, if an opportunity should not be given to them to be heard and to produce testimony in support of the injunction. In particular as regards the creditors of *Casenave*, whose interest it is the duty of the petitioner to protect; and who, if this decree be allowed to stand as final, will be deprived of the value and proceeds of a large tract of land in the state of Kentucky, to which they would be entitled, if the injunction were made perpetual, as appears by an award made in a suit which was depending in Baltimore County Court, in which *Samuel Moale*, trustee of *James Walker*, an insolvent debtor, was plaintiff, against *Robert Walsh* defendant, which award is in these words,

‘We find that the said *Robert Walsh* the defendant, is indebted to the said *Samuel Moale* the plaintiff, trustee of *James Walker*, the surviving partner of the firm of *Casenave & Walker*, in the sum of \$6,509 16, current money of the United States; and we do hereby award and order, that the said defendant shall pay to the said plaintiff the said sum of \$6,509 16, within six months from the date hereof. And we do further award, that the said *Robert Walsh*, shall, by a good and sufficient deed, convey and make over unto the said *Samuel Moale*, trustee as aforesaid, his heirs and assigns, all his estate, right, title, claim and interest in and to certain tracts or parcels of land lying in Nelson county, in the state of Kentucky, containing about twenty thousand seven hundred eighteen and three-fourths acres of land, which he, the said *Robert Walsh*, acquired by virtue of a certain deed of conveyance, dated the 23d day of March, 1795, from a certain *James Kerr* to the said *Robert Walsh*. The said lands to be conveyed by the said *Robert Walsh* to the said *Samuel Moale*, as aforesaid, free, clear of and from all incumbrances which may have been created by the said *Robert Walsh*, and also clear of all taxes which have accrued since the date of the said deed from *James Kerr* to the said *Robert Walsh*; which lands we find were conveyed to the said *Robert Walsh*, as agent of *Casenave & Walker*, of whom the said *James Walker* was surviving partner. *Provided always*,

however, and it is the true intent and meaning of this award, that the said *Robert Walsh* shall not be compelled to execute the said deed of conveyance until a perpetual injunction shall be granted by the honourable, the Chancellor of Maryland, in a cause or causes now depending in the High Court of Chancery, wherein the said *Robert Walsh* is complainant, and seeks to be protected against the effect of sundry judgments at law against the said *Robert Walsh*, obtained on bonds executed by the said *Robert Walsh*, to a certain *Thomas Smyth, Jr.* of the state of Georgia, which bonds we find were given by the said *Robert Walsh*, as agent of the said *Casenave & Walker*, of whom the said *James Walker* was surviving partner.' Made and signed on the 17th of April, 1816; and judgment rendered thereon on the 4th of May, 1816.

The petition further stated, that the petitioner, from the information he has received, has good cause to believe, and does believe, that a gross fraud was practised on the plaintiffs by the pretended sale to them by *Smyth* and *Lynch*, of lands to which they had no good or valid title, as is set forth in the bill; and that if an opportunity were given by a rehearing of the cause, and admitting him as a party plaintiff thereto, he could and would obtain sufficient and competent testimony to sustain the allegations of the plaintiffs in the bill, on which the equity was founded which entitled them to the injunction originally granted; and to satisfy the court that it ought to be made perpetual.

Upon which the petitioner prayed, that the decree of the 6th of September, 1830, might be rescinded, the case reinstated, and the injunction heretofore granted revived and continued in full force until further order; that he might be made a party plaintiff according to the provisions of the act of Assembly; that all further proceedings at law, as heretofore enjoined, might be suspended and stayed until further order; and that he might have such other and further relief as the nature of his case required.

The petitioner by his supplemental petition stated, that at the time the case was set down for hearing, *Casenave* had no counsel in court; that the solicitor who had been employed by him died many years since; and those solicitors whose names were marked on the docket for the plaintiffs, appeared for and were the solicitors of *Walsh* alone; and then goes on to state as before, in his original petition, that the suit had not been revived against the representatives of *Casenave*. And then as before, prayed to be admitted as a

party, &c. To the truth of this supplemental petition, *William Gwynn*, a solicitor of the petitioner, made affidavit in the usual form.

Whereupon, it was *Ordered*, that these applications stand for hearing on the 5th of October, then next, provided that copies be served, &c.

12th October, 1830.—BLAND, *Chancellor*.—The petition of *John Glenn*, administrator *de bonis non* of *Stephen Casenave*, deceased, standing ready for hearing, the solicitors of the parties were fully heard, and the proceedings read and considered.

It has been contended, that whatever may be the fate of this application, *Richard Emory* cannot be in any manner affected by it; because he was brought in by the amendment made to the original bill; and although an injunction had been asked for by that amendment, it does not appear that any writ of injunction was ever awarded against him. Whether such was the fact or not, or how far his judgment and its incidental lien may be affected by the actual state of these proceedings, it may not be necessary at this time to determine, since he is dead, and his representative who was made a party to this suit, is not now here complaining of any thing.

But the indistinct manner in which the amendment has been made, in this case, has left an obscurity over it in this particular, which may perhaps hereafter be the occasion of much difficulty.

A supplemental bill is a distinct record; but an original and amended bill are, in general, treated as one entire bill, and as constituting, in fact, but one record; and therefore, after a bill has been amended, the proceedings are on the amended bill; that is, on the original bill so amended. An amendment does not, however, alter the time of filing the original bill; it is only amended by virtue of an order dated on a day specified; so that the pendency of the suit, as to those parts which are amended, is only from the time of filing the amendment; nor can the new matter introduced by an amendment be used in aid, or to the disadvantage of any thing previously done in the suit. As if a plaintiff had obtained an injunction on his original bill, and the defendant had answered, and then the plaintiff had amended his bill; the proceedings, to get rid of the injunction, must be on the original bill and the answer to it; the amendments cannot be used in support of the injunction. (c)

(c) *Vernon v. Vawdry*, 2 Atk. 119; *Long v. Burton*, 2 Atk. 218; *Vere v. Glynn*, 2 Dick. 441; *McMechen v. Story*, 1 Bland, 184, note.

Hence it is evident, that whatever may be the nature of the amendment, it should be so perspicuously and distinctly introduced and placed upon the record as to afford the means of readily, and at once distinguishing the original bill from each one of the amendments to it, and also of ascertaining the day when each one of the amendments was put upon the record.

No amendment of a bill can be made without the leave of the court, which in all cases should be applied for by petition concisely stating the circumstances which render an amendment necessary. Under a leave to amend, a practice has however, prevailed here, as in England, of allowing short and apparently unimportant amendments to be made by interlineation; such as the mere correction of a verbal error; the alteration, striking out, or introduction of a name; (*d*) or the making of a single allegation, not materially varying the general structure of the case. But the safer and better course, in almost all cases, is to put the new matter upon the record by a separate amended bill; in which the original bill should be recited, no further than may be necessary to introduce the amendment, so as to avoid impertinency; for, as on the one hand the original perspicuity and distinctness of the record should be preserved, without obscuration or defacement, so on the other it is the duty of the court to discountenance as much as possible any attempt to put a suitor to unnecessary expense. Consequently, under a leave to amend, the plaintiff should not be permitted, as in this instance, by interlineation, to confuse the new with the original matter; or by an amended bill to recite all the allegations, and all the charges in the original bill, making a complete duplicate of the record. (*e*)

Much has been said about the mismanagement of this case; and it may be true, that the interests of the parties have been grievously neglected. But upon this occasion, and in this stage of the proceedings, I am not allowed to take into consideration the interests of any one who does not complain; nor can I regard the prayer of this petitioner farther than his rights may be injuriously affected by the decree which has been passed.

(*d*) *Gambril v. Lyon and others*. 20 June, 1804.—HANSON, *Chancellor*.—On application of the complainant, leave is given to strike out the defendant R. Lyon, as immaterial, M. S.—1 Newland's Pra. Chan. 193; *Pitt v. Macklew*, 1 Cond. Chan. Rep. 67, note; *M'Comb v. Armstrong*, 12 Cond. Chan. Rep. 459.—(*e*) *Willis v. Evans*, 2 Ball and Bea. 228; *Boyd v. Mills*, 13 Ves. 86; *Webster v. Threlfall*, 1 Cond. Chan. Rep. 67; 1 Newl. Prac. Cha. 193; 1 Monta. Dig. 297; 1 Fowl. Exch. Pra. 106; *Onge v. Truelock*, 12 Cond. Chan. Rep. 332.

The plaintiff *Robert Walsh* does not ask for a rehearing, and it is perfectly manifest, that he must be fully sensible of his not having a single shadow of a pretext to complain of having been taken by surprise by this decree. After a lapse of thirty-three years since the commencement of this suit by him, he surely cannot now be allowed to say, that the decree has taken him unprepared for the controversy; or that he could now, if permitted, obtain proof to establish the allegations of his bill. He therefore, it is clear, must be held firmly bound by the decree in every way whatever, subject only to an appeal.

It is alleged, that some of the defendants were dead long before the passing of this decree. If so the suit abated as to them; and if the plaintiff *Walsh* had deemed it necessary, for his benefit, to have had the suit revived as against their representatives he might have done so. But since he has set the case down for hearing without calling for a revival of it against the representatives of the deceased defendants, he cannot now complain of the total dissolution of the injunction as to them, as it was not in their power to have revived this suit without his consent for any purpose. (f) But the representatives of the deceased defendants do not complain of any thing, and the plaintiff having failed to establish his case, the bill has been dismissed as to all the defendants; and thus no one of them has been injured by the decree, or subjected to any undue proportion of liability, or obtained any advantages not common to them all, so far as their interests may have been in any way connected. (g)

The petitioner complains of the wrong done to his intestate; and of the injury likely to be done to his creditors. But it is perfectly clear, and indeed was admitted in the argument, that this suit having abated by the death of the petitioner's intestate, it was totally at an end as to all his interests; and his representative being no party to the suit cannot, in any way whatever, be bound or affected by the decree which has been passed after that abatement.

The petitioner, therefore, can have no right to complain of the decree in any respect, as his intestate's interests are not molested by it. If it be true that the consideration of the bonds, by which the petitioner's intestate became jointly bound with the plaintiff *Walsh*, was unfounded and fraudulent, he may now avail himself of such circumstances in any manner the law will allow, unembar-

(f) *Griffith v. Brounagh*, 1 Bland, 548.—(g) *Mandeville v. Riggs*, 2 Peters, 482.

passed, and entirely uninfluenced by this decree; and there can be no occasion to set it aside to let in his proofs, and to rehear this case for any such purpose. And besides, for aught that appears, or has been shewn, there are no assets real or personal, which were the property of the late plaintiff *Casenave*, that can or may be in any manner covered or protected by this injunction, even if it were made perpetual.

It has been urged, that so much of this decree as dissolves the injunction has been improvidently made; because it was awarded in a case to which the intestate of the petitioner had been a party; and that since his death it has been dissolved without his representative having been made a party, or being notified to revive.

It is true, that an abatement of a suit, in which an injunction had been granted, does not in strictness immediately and of itself dissolve the injunction; because the injunction, as a judgment of the court, gives a present vested right which must stand until reversed or revoked by the court itself. And it is therefore, a general rule, founded on the liberality of the court, that, in all such cases of abatement, to prevent the representatives of the deceased from being taken by surprise, notice must be given to them to revive, or that the injunction be dissolved. (*h*)

In this case the injunction has been dissolved, without any such notice; and, therefore, the only question now is, whether, looking to all the circumstances of this case, it might have been dissolved without any actual notice to the legal representatives of the late plaintiff *Casenave*?

According to the English authorities, such a notice, when required to be given, is in general very peremptory and short, usually not more than a week. (*i*) But the deceased party may have, in fact, no legal representatives, or they may be numerous and dispersed, or they may reside abroad, so that it would be impossible or very difficult to give them actual notice. (*j*) Where the representative was not a resident of this state, I have ordered notice to be entered on the docket to revive before the next term, or that the injunction then stand dissolved; and in that case I declared, that

(*h*) *Chandos v. Talbot*, Sel. Ca. Cha. 24; *White v. Hayward*, 2 Ves. 461; *Forum Rom.* 198; *Eden Ing.* 93; 2 *Mad. Cha.* 533; 1 *Fowl. Exch. Pra.* 287.—(*i*) *Stuart v. Ancell*, 1 *Cox*, 411; *Hill v. Hoare*, 2 *Cox*, 50.—(*j*) *Carter v. Washington*, 1 *Hen. and Mun.* 203.

the lapse of time, nine years since the abatement, should be taken into consideration. (k)

But here the abatement took place more than thirty-two years ago, and there is strong reason to believe, that *James Walker*, the administrator of *Casenave*, must have known of the institution of this suit; because it is stated in the award exhibited by the petitioner, that the bonds, the consideration of which was the subject put in issue by this bill, 'were given by the said *Robert Walsh* as agent of the said *Casenave & Walker*, of whom the said *James Walker* was surviving partner.' Considering *Walker* then as administrator, as surviving partner, and as joint *cestui que use* with *Casenave*, the presumption seems to be conclusive, that he must have been fully aware of the situation of this suit, and of the extent to which his and *Casenave's* interests were likely to be affected by the continuance, or dissolution of the injunction. *James Walker*, therefore, could not have had any plausible pretext for asking, at this time, for any further indulgence, or to be allowed to come in and sustain the equity upon which the injunction had been granted. But *Walker* has been dead more than twenty years; and, during all that time, and when this decree was passed, there was, in fact, no one to whom notice could have been given by these defendants to revive, or have the injunction dissolved. A notice entered on the docket would have been nugatory and a mere waste of time. So that if it could not have been dissolved without notice of any kind, after such a lapse of time, it must have been allowed to stand, in effect, as a perpetual injunction. I am therefore of opinion, that under such circumstances the great lapse of time must of itself be deemed a sufficient ground to entitle any of the surviving parties, or the representative of a defendant, to claim and move for an immediate and total dissolution of the injunction. (l)

It has been urged, however, that as *Casenave* was originally a party with *Walsh* in this bill by which they jointly asked to have *Smyth* and *Lynch*, the vendors, decreed to refund the purchase money which had been paid to them, on the ground, that the consideration of the whole contract was fraudulent and had failed, his representative was therefore a necessary party, without whom there could be no valid decree or regular dissolution of the injunction.

(k) *Griffith v. Bronaugh*, 1 Bland, 517.—(l) *Willis v. Yates*, 8 Cond. Cha. Rep. 512.

But, although they might be allowed to join, it was not indispensably necessary that both *Walsh* and *Casenave* should have been originally made parties to this suit. The consideration of all the bonds was certainly one and indivisible, as regarded all the defendants who held and claimed payment of them; and that consideration, being joint, when put in issue, must stand or fall as regards them all. The relief, however, asked by *Walsh* and *Casenave*, was not so necessarily and indissolubly conjoined; they did not derive their title through a conveyance from several, some of whom were not parties to the suit; (*m*) nor did they or either of them ask the distribution of a fund in which they or either of them, with others, claimed a right to participate. (*n*) Either of them, without prejudice to the other, might have waived the benefit of any substantial ground of relief in this case, of which, both might have taken advantage. If their bonds had been tainted with usury, a plea of usury sustained in favour of one would not, of itself, be a bar to a recovery against the other, who did not choose to rely on any such defence. (*o*) Where a party rests his right to relief or recovery against several upon the validity of a claim or consideration, which is inseparably common to them all, in such case the decree would be palpably inconsistent which should grant relief against one and not against another, upon the ground that the same claim or consideration was good as to one and bad as to another. (*p*) But where several obligors have a ground of relief or defence of which all may take advantage, that relief or defence may certainly be asserted or waived by any one without prejudice to another of them. (*q*) So here, if the consideration of this purchase had so failed as to enable both *Walsh* and *Casenave* to claim a return of the purchase money from *Smyth* and *Lynch*, the court might grant relief, or sustain the defence of both, or of either *Walsh* or *Casenave* as against *Smyth* and *Lynch*; but as *Smyth* and *Lynch* must claim together under the same consideration, its invalidity must be established as to each, since the court must, upon that ground, grant the same relief to both of them.

Hence as *Walsh* and *Casenave* might each be relieved separately without prejudice to the other, or to the interests of these defendants, it was not indispensably necessary, that they should both

(*m*) *Dandridge v. Washington*, 2 Peters, 376.—(*n*) *Hunt v. Wickliffe*, 2 Peters, 215.—(*o*) *Selwyn's N. P.* 582.—(*p*) *Lingan v. Henderson*, 1 Bland, 236.—(*q*) *Whetcroft v. Christee*, 4 H. and McH. 387.

come or be brought before the court as parties to this suit, although they might well have been permitted to sue together. (r)

It would seem from the little interest taken in the matter by *Casenave*, for it appears that he never swore to the bill nor joined in the injunction bond, that he was by no means very earnest in assuming the position taken by *Walsh*; and his administrator *Walker*, it would seem, had refused or neglected to concern himself about the affair in any way whatever. Upon the whole, I am of opinion, that this decree may well stand as it does, binding the interests of *Walsh* alone.

The petitioner asks to have the injunction reinstated and the case reheard, as a necessary means of protecting the interests which the creditors of his intestate have in the proceeds of a certain tract of land, in the manner described in the award exhibited by him. But, that award was made in a suit between *Samuel Moale*, trustee of *James Walker*, an insolvent, against *Robert Walsh*; and the conveyance directed by that award was to be made to that trustee of *Walker*; consequently, that trustee, and not this petitioner, is the representative of the creditors, who alone, by the terms of the award, are to be benefited by the continuance of the injunction. This petitioner is *Casenave's* administrator, he represents him alone, and is considered in equity as a trustee for the benefit of *Casenave's* creditors and next of kin. The award secures no benefit to them, but to the creditors of *James Walker*, the insolvent surviving partner of *Casenave*. This award, therefore, secures to the administrator of *Casenave* no beneficial interest whatever. And putting aside that document, the petitioner has shewn no assets nor any interests of his intestate which can be protected by him alone either for creditors or next of kin; and which, if he should not be let in as a party to this suit, can be in any way affected by the decree or the dissolution of the injunction.

It is alleged in the petition, that irreparable injury will be done to the *bona fide* purchasers without notice of the lands bound by the judgment rendered against the plaintiff, if the injunction be dissolved without giving them an opportunity of being heard, and of producing testimony in support of the injunction.

But those judgments, being liens of record, were in themselves,

(r) *Finley v. Bank U. S.* 11 Wheat. 304; *Minor v. The Mechanics Bank of Alexandria*, 1 Peters, 47; *The Mechanics Bank of Alexandria v. Seton*, 1 Peters, 306.

notice to those purchasers; and they being no way concerned with this matter in controversy, farther than as they voluntarily involved themselves in its consequences, by purchasing the lands which were so bound, they can have no right to come in as parties, or to have a rehearing of the case. If the lands which they purchased had been the immediate subject of controversy in this suit, pending which they had purchased, then that *lis pendens* would clearly have been such a notice to all such purchasers as effectually to bind them to abide by the event of the suit, without having the privilege of being admitted as parties to it in any manner whatever. (s) But those purchasers of the realty do not complain; and even if they did, the personal representative of *Casenave* cannot be allowed to come here as the bearer of their complaints; and there is no heir or devisee to whom *Casenave's* real estate passed on his death, asking to be let in as parties, or to have this decree rescinded and the case reheard, for the protection of their interests or of those of any one who claims under their ancestor or devisor. This decree therefore cannot be disturbed for any such purpose.

The petitioner alleges, that if permitted to come in as a co-plaintiff, he could and would obtain sufficient proof to establish the matters set forth in the bill. He does not pretend to have discovered any testimony which was not known to him in time to have had it produced and used at the hearing of the case; nor does he in any manner account for the very great negligence of *Casenave*, or of his administrator *Walker*, or of those who must have had a legal and beneficial object in sustaining *Casenave's* interests, if any he had after the death of *Walker*, he never having attempted to come in and bring before the court, that sufficient and competent testimony which he now says he believes may be obtained for that purpose.

If such general and loose allegations as these were to be deemed sufficient ground to open a decree and to grant a rehearing of the case, there would be no end to litigation. It is a most incumbent duty of the court, to take care that the same subject should not be put in a course of repeated litigation, and with that view, to require of parties reasonably active diligence in the first instance. (t) If the representative of *Casenave*, or those by whom it was fit to have his interests taken care of after his death, had used any ordinary dili-

(s) *The Mechanics Bank of Alexandria v. Seton*, 1 Peters, 299.—(t) *Young v. Keighly*, 16 Ves. 351.

gence, they certainly might have brought before the court in this suit, in a course of thirty-two years, which has elapsed since his death, every particle of that competent and sufficient testimony which the petitioner says might even yet be obtained. It is not enough to shew that injustice has been done in any instance, even supposing a case of that sort to have been exhibited by the petitioner, but that it has been done under circumstances which authorize the court to interfere. The court must see that injustice has been done, not merely through the inattention of a party, but that owing to some peculiar state of things, he could not have sooner availed himself of his means of relief; that he was ignorant of his proofs, or that the matter on which he relies, could not have been sooner or otherwise brought before a court of justice for adjudication. (u) In fine, I am entirely satisfied that the prayer of the petitioner ought not to be granted.

Whereupon it is *Ordered*, that the said petition, filed by *John Glenn*, administrator *de bonis non* of the late *Stephen Casenave*, and also the said supplemental petition, be and the same are hereby dismissed, with costs to be taxed by the register.

TESSIER v. WYSE.

A creditor is not bound to use active diligence against his debtor. The plaintiff in a creditor's suit is not bound to allege and shew, that he had used any degree of active diligence, or that the personal estate of his deceased debtor was insufficient to pay his debts in order to have his real estate sold for that purpose. The sufficiency of the personal estate of the deceased to pay his debts, giving that ground of equity upon which the realty is saved for the benefit of the heir or devisee, it is with him alone to allege and shew that fact. The liability of heirs as tenants, and the equity between them as to contribution. Where the obligor binds himself and his heirs, the land descended is liable in the hands of the heir; but if there be personal estate, and the heir pays the debt, he may be reimbursed from such personalty, upon the ground of its being the primary and natural fund for the payment of debts. The cases in which the parol shall demur during the infancy of a party.

In a creditor's suit, by a bond creditor, independently of any statutory provision, the personal estate was always first applied, as far as it would go, to save the realty; and the statute making lands liable to be taken in execution and sold for the payment of debts, has made no alteration as to any creditors in that respect;

(u) *Bateman v. Willoe*, 1 Scho. & Lefr. 204; *Kemp v. Squire*, 1 Ves. 206; *Stanard v. Rogers*, 4 Hen. & Mun. 439; *Winston v. Johnson's executors*, 2 Mun. 305; *Erwin v. Vint*. 6 Mun. 267.

although it has been so construed as to allow simple contract creditors to obtain payment from the realty in no other way than by a creditor's suit in equity. The act of Assembly which authorizes the sale of land, with the consent of the guardian of the infant, does nothing more than, so far, to qualify the infant's privilege to have the parol to demur. The several acts of Assembly relative to the mode of proceeding by or against an infant, where a suit at law abates by death; and relative to the administration of assets, have made no alteration in the law as to the rights of creditors, or as to the mode of proceeding in a creditor's suit. The only material alteration of the pre-existing law made by the act of Assembly in relation to the sale of real estate descended or devised to infants, is that of having virtually abolished an infant's privilege of having the parol to demur in a creditor's suit. The provisions of the act of Assembly allowing creditors to obtain satisfaction from the escheatable estate of their debtor, do not affect their rights, or any mode of proceeding as against his heirs or devisees. Where the then defendants are entitled to both personal and real estate, the making of the personal representatives of the deceased debtor a party may be dispensed with.

In a creditor's suit, even if the bill should be dismissed as to the heirs, yet relief may be had against the administrator to the extent of the assets in his hands. The decree for a sale virtually puts the estate under the protection of the court; and, therefore, an injunction may be granted to stay waste. The mere fact of an infant's having attained his full age is not a ground for rehearing in a creditor's suit. Although an infant, who attains his full age pending a suit, may be allowed to come in, as of course, and demur, plead, or answer, yet he cannot be permitted to do so in a creditor's suit after a decree.

THIS bill was filed on the 15th of June, 1825, by *John Tessier* and *Samuel Smith* and *James A. Buchanan*, trading under the firm of *S. Smith & Buchanan*, against *John M. Wyse*, *William A. Wyse*, *Eliza Wyse*, *Margaretta Wyse*, *Edward Wyse*, *Nicholas H. Wyse*, *Matilda Wyse*, *Francis O. Wyse*, *Joseph Allender*, and *George Riston*. The bill states, that *William Wyse* was indebted to the plaintiffs *S. Smith & Buchanan*, in the sum of \$2,737 48, for sundry matters properly chargeable in account; that *William Wyse* made his will in the following words:

'Baltimore, 12th March, 1814, having at this perilous moment of my life committed myself to the care of Almighty God, whom I trust will receive my soul, I have only to request my affectionate wife and son *John*, in case of a deficiency of my estate to support and educate my children, that my real estate, and now known by the name of the Deer Park, be disposed of for the maintenance of said children, under the direction and management of my wife *Rachel*, and *John Wyse*.'

The bill further states, that *William Wyse* afterwards, on the first of April, 1814, died so indebted, seised and possessed of a large real and personal estate, leaving a widow *Rachel Wyse*, and these defendants *John M.*, *William A.*, *Eliza*, *Margaretta*, *Ed-*

ward, *Nicholas H.*, *Matilda* and *Francis O. Wyse*, his children and heirs at law; that this his will was proved according to law on the 12th of April, 1814, and administration with the said will annexed was thereupon granted to his widow *Rachel Wyse*, who took possession of his personal estate accordingly; and, by her first account, passed on the 29th of June, 1816, shewed a balance of assets then in her hands of \$5,712 34, and that the testator's widow and son *John M. Wyse*, filed a petition in this court, admitting the claim of the plaintiffs *S. Smith & Buchanan*, and praying for the sale of the real estate as mentioned in the will. Upon which, on the first of October, 1816, it was decreed accordingly, that the lands be sold; but that the decree still remained unexecuted. The bill further states, that the plaintiffs *S. Smith & Buchanan*, being indebted unto the plaintiff *Tessier*, in the sum of \$4,500, on the 22d of January, 1820, assigned to him, in part satisfaction thereof, their claim upon the estate of *William Wyse*, deceased, which then remained wholly unpaid; and which claim, although passed by the Orphans Court, the administratrix being then unable to pay, she, on the same day, gave her bond, with the defendant *John M. Wyse* as her surety, to the plaintiff *Tessier*, for the payment of \$4,325, with interest thereon, in one year from that time, that being the amount of both principal and interest of said claim then due; for which bond the plaintiff gave a receipt; but the said bond was accepted by the plaintiff *Tessier*, as an indulgence and benefit to the representatives of the testator, it being expressly understood and agreed by the parties, that the said obligation should not, in any way, invalidate or destroy the plaintiff *Tessier's* claim against the estate of the testator; that the bond not being paid when it became due, the plaintiff *Tessier* brought suits upon it; and at March term, 1822, of Baltimore County Court, the administratrix *Rachel Wyse*, and this defendant *John M. Wyse*, confessed judgments, but the bond, from which alone the precise sum due could be ascertained, having been lost, the definite amounts were never entered up, and those judgments therefore still remain altogether inoperative. The bill further states, that on the 16th of May, 1822, the defendant *William A. Wyse*, being indebted unto the defendant *Riston*, in the sum of \$2,000, the said *Rachel Wyse*, with the defendants *John M. Wyse*, *William A. Wyse*, and *Eliza Wyse*, mortgaged their respective interests in the real and personal estate of the testator to secure the payment of the same to the defendant *Riston*; that afterwards *Rachel Wyse*

departed this life; and after her death, on the 16th of July, 1823, letters of administration *de bonis non*, with the will annexed of the testator *William Wyse*, deceased, were granted to the defendant *Joseph Allender*, who returned an inventory and appraisement amounting to \$2,293; that the difference which appears to be due to the testator's estate between the balance in the account rendered by the said administratrix *Rachel Wyse*, and the amount of assets returned by the administrator *Allender*, was expended in the maintenance, support and education of the testator's children.

Whereupon the bill prayed, that the administrator *de bonis non*, might set forth and declare what had become of the personal estate of the testator; that the said receipt might be delivered up to be cancelled; that the mortgage to *Riston* might be set aside in favour of these plaintiffs; that the defendants or such of them as were liable therefor, might be ordered to pay the plaintiffs' claim; or in default thereof, that so much of the real and personal estate of the testator as might be necessary for the satisfaction thereof be sold; and that the plaintiffs might have such other relief as the nature of their case might require.

On the 8th of August, 1825, the defendant *Riston* put in his answer, in which he says, he cannot admit that the testator was indebted to the plaintiffs; but he admits that the testator made his will and died about the time stated, leaving a widow who administered on, and took possession of his estate; and also left the children as mentioned in the bill. This defendant says he knows nothing of the bill of complaint referred to as having been filed in this court. But he admits that a bond was given as stated, which he avers was received by the plaintiff *Tessier*, in full satisfaction of his claim against the estate of the deceased. This defendant also admits the recovery of the judgments; but does not admit, that they are inoperative by reason of the loss of the bond of which he knows nothing. This defendant moreover admits, that the mortgage was made to him as stated; that *Rachel Wyse* is dead; that after her death, administration *de bonis non* was granted to the defendant *Allender*; but he does not admit, that the said difference in the amount of the personal assets was expended in the maintenance and education of the children of the deceased. And finally, this defendant submits, that by the negligence and misconduct of the plaintiff *Tessier*, he has lost all right to demand any portion of either the real or personal estate of the testator; and that his only remedy is against the person of the defendant *John M. Wyse* or his estate, if he has any, &c.

The defendants *Eliza Wyse* and *Margaretta Wyse*, on the 30th of September, 1825, put in their answer, in which they admit, that their father made his will and died seised and possessed of real and personal estate, leaving the children as mentioned, and a widow to whom administration was granted, and who took possession of the personal estate accordingly. They state, that a part of the real estate was sold under the decree mentioned in the bill, and the proceeds of the sale applied to the maintenance of the children of the deceased. But they expressly deny that the defendant *Tessier* ever had any claim against the testator, either as assignee or otherwise; and they say they do not know the amount of the claim of *S. Smith & Buchanan*.

On the same day the infant defendants *Edward, Nicholas H., Matilda*, and *Francis O. Wyse*, put in their answer by their guardian, *ad litem*, in which they admitted the will and death of the testator as stated, and hoped that the court would protect their rights.

The defendant *Allender*, by his answer, filed on the 14th of December, 1825, admits the will, the death of the testator, the administration to *Rachel Wyse*, her possession of the personalty, the making of the mortgage to the defendant *Riston*, the death of *Rachel*, and the granting of administration *de bonis non* to himself, and the inventory returned by him as stated in the bill. He also admits, that the testator was indebted to *S. Smith & Buchanan*, but does not know the amount; nor does he know any thing of the assignment of their claim to the plaintiff *Tessier*; and he denies that he has any evidence of that claim in his possession.

On the 13th of April, 1826, the defendant *John M. Wyse* filed his answer, in which he admits, that the testator was indebted to *S. Smith & Buchanan*; that he made his will, and that after his death, administration was granted to his widow *Rachel Wyse*, who is since dead; and that the testator left the children and died seised and possessed of real and personal estate, as set forth in the bill; that a decree was obtained for the sale of the real estate of the deceased, as directed by his will; and about sixty acres of it was sold, and the proceeds thereof appropriated to the benefit of his children; and that a mortgage was made, as stated, to the defendant *Riston*. This defendant further states, that it was agreed between the plaintiffs *Rachel Wyse* and this defendant, that in consideration of the plaintiff *Tessier's* delivering to *S. Smith & Buchanan* their note held by him, they would assign to him their

claim upon the testator, for which his then administratrix *Rachel Wyse* and this defendant were to give their bond for the amount thereof, including principal and interest up to that time; which note was accordingly delivered, assignment made, and bond given by them and received by the plaintiff *Tessier*, in full satisfaction of his claim against the estate of the testator; and that the plaintiff *Tessier* never received the assignment of the account and claim of *S. Smith & Buchanan*, with a view of demanding payment of the estate of the testator; and that the said account and claim, with a receipt thereon, was in the possession of this defendant, but has been mislaid by him and cannot now be found. This defendant admits, that suits were brought and judgments obtained on the bond, as stated.

The defendant *William A. Wyse* filed his answer on the 26th of April, 1826, in which he admits, that the late *William Wyse* made his will; that after his death, administration was granted, &c. as stated in the bill. This defendant also admits, that the testator was indebted to *S. Smith & Buchanan*; but puts the plaintiff to the proof of the account: He, however, expressly denies, that the claim of *S. Smith & Buchanan*, was by them assigned to the plaintiff *Tessier*, or that he now has, or ever had any such claim as the real estate which descended to this defendant from the testator, can legally or equitably be chargeable with; nor have *S. Smith & Buchanan* now any claim, legal or equitable, against the said real estate. This defendant admits, that a part of the real estate of the deceased was sold under a decree of this court, and the proceeds thereof applied to the maintenance and education of his children.

To these answers the plaintiffs put in a general replication; upon which commissions were issued, under which proofs were taken and returned. From the testimony it appears that *William Wyse* made his will, and died seised of real estate, consisting of houses, and a wharf in the city of Baltimore, and of a farm in Baltimore county; and possessed of a considerable amount of personal property, leaving a widow and children, as stated and named in the bill; that administration with his will annexed was granted to his widow *Rachel Wyse*, who on the 23d of July, 1814, returned an inventory of his personal estate, consisting of negro slaves, cattle, farming utensils, household furniture, merchandise, and other articles, amounting to \$6,735 25; and by her first account, passed on the 29th of June, 1816, she admitted, she had

assets then in her hands to the amount of \$5,712 34. The claim of *S. Smith & Buchanan*, and the assignment of it to *Tessier*; the giving of the bond by *Rachel Wyse* and *John M. Wyse* to *Tessier*, not as a payment, but merely as a collateral security, as stated in the bill, were fully established by several witnesses. It was also shewn, that judgments had been confessed; but that they remained ineffectual, as stated, because the bond had been lost by the attorney of the plaintiff *Tessier*. It was further shewn, that a mortgage had been made, as stated, to *George Riston*. That in the petition filed by *Rachel Wyse* and *John M. Wyse* in this court, for the sale of the testator's real estate, called Deer Park, it was stated, that *S. Smith & Buchanan* had a claim against his estate; and that after the payment of that claim; deducting the commissions to the administratrix; and the widow's third, the other two-thirds left for the support of the children, would be wholly inadequate for that purpose; so that their interests and necessities required a sale of the lands as directed by the testator. On the 1st of October, 1816, a decree was therefore passed directing a sale; which sale, as admitted by the answers of some of the defendants, was accordingly made. It was further shewn, that *Rachel Wyse* was dead; that administration *de bonis non*, with the will annexed, had been granted to *Joseph Allender*; who on the 23d of January, 1824, returned an inventory of the property which had come to his hands, amounting to \$2,293, consisting of negro slaves, cattle, household furniture, and some other articles.

7th September, 1830.—BLAND, Chancellor.—This case standing ready for hearing, and having been argued by the plaintiff's solicitor, and submitted without argument by the solicitor for all the heirs of the late *William Wyse*, and no solicitor appearing for the other defendants, before the close of the sittings of the term according to the rule, the proceedings were read and considered.

The claim of the plaintiff *Tessier*, as stated in the bill, has been fully established. But the defendant *Riston*, in his answer, alleges, that the plaintiff *Tessier*, by his negligence and misconduct, has lost all right to any portion of either the real or personal estate of the testator; and that his only remedy is against the person of the defendant *John M. Wyse*. And the defendant *William A. Wyse*, denies that *S. Smith & Buchanan* now have, or ever had any such claim as the real estate of the testator could be charged with. From these allegations it is clear, that these defendants do not rely upon the statute of limitations, or any lapse of time as a bar

to the plaintiff's claim. And so far as these or any other allegations of any of these defendants may be understood to rely upon the fact, as stated by the defendant *John M. Wyse*, that the plaintiff *Tessier* received the bond in full satisfaction of his claim against the estate of the deceased, it is met, and so totally disproved by the testimony, that there is not left even a plausible pretext for any such defiance to rest upon. But, it would seem to be intimated, by these allegations; and, perhaps, it was intended to be relied on as a defence, that, as the plaintiff *Tessier* might have obtained satisfaction from the personal estate of the deceased, he has now, by his negligence and misconduct, lost his right to have recourse to the deceased's real estate.

The nature of the negligence and misconduct of the plaintiff *Tessier*, thus relied on as a bar to his claim, have not been distinctly described; but, from all the circumstances of the case, it is evident, that none can be imputed to him, other than that of having failed to exert more active diligence for the recovery of his claim, either against the personal representatives, or the heirs of his deceased debtor, or both of them.

But a creditor is, under no circumstances, bound, in behalf of his principal debtor, to use any degree of active diligence. Considering the debt as an incumbrance, or as an inconvenience in any way, it is in the power of the debtor at pleasure, to remove it by making payment according to the terms of his own stipulation. If the creditor should remain inactive so long as to afford a legal presumption, that the debt had, in truth, never existed, or had been paid, the debtor may protect himself by relying on the statute of limitations, or the lapse of time as conclusive evidence in support of such presumption in bar of the plaintiff's claim. Apart from the statute of limitations, or lapse of time as a bar, upon which none of these defendants have relied, no debtor is ever permitted to complain of the mere inactivity of his creditor. And, unless in cases where a creditor can be charged as a trustee, guilty of a breach of trust in not claiming, his merely neglecting to sue can never be imputed to him as a wilful default, or as injurious conduct towards any one. (a)

Here the debtor is dead, and the claim is made against his personal representative, and his heirs in respect of the personal and

(a) *Heath v. Percival*, 1 P. Will. 683; *Powell v. Evans*, 5 Ves. 839; *Wright v. Simpon*, 6 Ves. 726; *Tebbs v. Carpenter*, 1 Mad. Rep. 290.

real assets which have come to their hands. It is a mortgagee from some of the heirs, and an heir who makes this defence against this claim.

As regards the mortgagee, it is perfectly clear, that he might, at any time, have sued for and recovered his claim by bill for a foreclosure and sale, or otherwise; or he might, by a creditor's suit, have called before the court the creditors of the deceased, in order to have the property, so far as it had been mortgaged to him, relieved from their prior claims, by having them satisfied or rejected, so as to have the surplus applied in satisfaction of his claim. This mortgagee cannot, therefore, be permitted to complain of the negligence of this creditor, when it is so perfectly obvious, that he might have had him called before the court, and thus compelled to receive satisfaction for his, this mortgagee's, benefit. It is equally well settled, that a next of kin or heir may, by a creditor's suit, have the personal and real estate administered in equity, in order to have the estate cleared of the claims of creditors, so that what remains, may be at once awarded to him, or distributed among all such next of kin or heirs of the deceased. And, consequently, it is no less clear, that a next of kin, or an heir, can in no way, be allowed to complain of the mere negligence of a creditor in not enforcing payment from the personal or real assets of his deceased debtor. (b)

And even supposing these defendants to stand in any way as sureties for the payment of this debt to the plaintiff *Tessier*; then, as sureties, they might by a bill *quia timet*, have compelled these plaintiffs to have sued and obtained satisfaction from the person first liable, or from the proper fund, so as to save them, these defendants, harmless. Therefore, considered even as sureties, these defendants cannot complain of the mere forbearance of their creditors; and thus have shewn no cause to impute to these plaintiffs negligence or misconduct of any kind whatever.

Perhaps these defendants by the charge of negligence and misconduct, and by the averment, that the plaintiffs have no such claim as the testator's real estate can be charged with, intend to take defence upon the ground, that having failed to allege and shew the insufficiency of the personalty, the real estate of the testator cannot be made liable for the payment of this debt. This is a case in which a creditor, in behalf of himself and other credi-

tors, claims a right to obtain satisfaction from the whole estate of his deceased debtor, leaving the burthen to be adjusted, as between the real and personal estate, as the law may allow, without prejudice to his or any other creditor's claims to relief.

The question then is, whether it is necessary in a creditor's suit, like this, that it should not only be shewn at the hearing, but distinctly stated and charged in the bill of complaint itself, that the personal estate was insufficient to pay all the debts of the deceased, and that the plaintiff had used all due diligence in endeavouring to obtain payment from the personalty, to enable him to obtain satisfaction by a sale of the real estate?

It is no less essentially necessary in a Court of Chancery, than in a court of common law, that a plaintiff should distinctly set forth every fact and circumstance which constitutes that title upon which he asks relief. The forms of proceeding in Chancery, are, in general, not so precise as at common law; but the several facts which constitute a plaintiff's title to relief are matters of substance which no court of justice can dispense with; they must, therefore, be clearly shewn according to the prescribed forms of the tribunal.

It has long been universally understood, that all the property of a debtor, real, as well as personal, without distinction or preference, was liable in one form or other to be taken in execution and sold for the payment of his debts. The necessity of applying to a court of equity to set aside conveyances or other obstructions fraudulently thrown in the way by a debtor, not being regarded as an exception to the general rule. The death of a debtor is never allowed to impair the obligation of his contract as respects his estate, or in any way to alter, or lessen the liability of his property. (c)

In a creditor's suit, instituted for the purpose of having a deceased debtor's whole estate administered in equity, the requiring all his representatives, his executor, or administrator with his heirs or devisees to be brought before the court, has never been deemed necessary upon any ground affecting the title of the creditor; or upon any principle having any injurious bearing whatever upon the creditor's rights. During the life-time of a debtor, his creditor, who has obtained judgment against him, cannot be hindered or delayed in the recovery of his debt, by being obliged to take first one species of property, and then another, in execution, in order to obtain satisfaction; since there is no one kind of a

debtor's property which is privileged from being taken in execution until another has been exhausted. It is clearly not necessary, in any case, during the life of a debtor to exhaust his personal estate as a means of coming at his realty. (*d*)

But if the objection now taken be well founded, then it necessarily follows, that the death of a debtor materially curtails the rights of his creditors; since on that event a creditor's title to relief must depend not merely upon the fact of his debtor having left property enough to pay all his debts; but upon the fact of its being alleged and shewn, that his personal estate is insufficient for that purpose; and also upon its being alleged and shewn, that he, the plaintiff, had, with all due diligence, endeavoured to obtain satisfaction from the personal estate of the deceased; in order thereby to lay a foundation whereon to proceed against the realty.

Hence it follows, if this proposition be correct, that the rights of a creditor are materially affected by the death of the debtor. If the law be so, as between creditor and debtor, then it is certainly true, according to the general rule, that a plaintiff must set forth every fact which constitutes any material portion of the title upon which he asks relief, that he should, in a creditor's suit, expressly allege and shew, that the personal estate of his deceased debtor was insufficient to pay his debts; and that he had used all due diligence in endeavouring to obtain payment from his personal estate to enable him to obtain a sale of his real estate for that purpose.

The matter here presented is one of much importance, since it is not confined to a mere form of practice; but involves the rights of creditors generally; and therefore requires to be fully investigated and carefully considered.

According to the common law, as between individuals, lands were in no way liable to be taken in execution and *sold* for the payment of debts. (*e*) This total exemption of real estate from any such liability, it is said, was a necessary consequence of the principles of the feudal system, which system, softened and divested of most of its odious and pernicious principles, having been incorporated into our code, (*f*) lands were, in like manner, exempted here as in England from being taken in execution and *sold* for the payment of debts. (*g*) According to the feudal sys-

(*d*) *Hanson v. Barnes*, 3 G. & J. 359.—(*e*) *Bac. Abr. tit. Execution A.*—(*f*) *Chart. Maryl. art. 5, 18*; *Kilty Rep. 146*; 1786, ch. 45. s. 1; *Calvert's lessee v. Eden*, 2 H. & McH. 279, 366.—(*g*) *Kilty Rep. 144*.

tem a feudatory was not permitted to alien the land so held by him, but was bound as tenant to render certain services to the king for the benefit of the public; and therefore it was held to be contrary to the nature of the tenant's holding, and prejudicial to the government, as interfering with the public revenue, to suffer the land to be taken in execution and *sold* for the payment of his debts; and also, because, looking to the inalienable nature of his real estate, it could not be presumed, that he had been trusted by his creditors any further than with a view to his personal estate. These reasons, it is obvious, ceased when the principles of the feudal system were so far relaxed as to allow to the fee simple owner of land, an absolute and unqualified right of alienation at his pleasure; nevertheless, the exemption was continued in full force. (*h*) But apart from these reasons for exempting land from being taken in execution, derived from the feudal system, it is said, that a creditor was not, by the common law, permitted to take away, by execution, the possession of his debtor's lands; because it would hinder him from following his husbandry and tillage which are so beneficial to the commonwealth. (*i*) This being a reason for the exemption derived from the nature of things, applies as forcibly now and here as at any former time or other place. And although it may be admitted to be by no means a sufficient cause for a total exemption of lands from being taken in execution; yet it is certainly reasonable, that lands should not be so levied upon and sold as materially to interrupt their cultivation, or endanger the loss of a then growing crop. (*j*)

In England, the common law was, in this respect, so far altered as to allow the lands of a debtor to be taken under an *elegit* or otherwise, and delivered to the creditor at an extended, or estimated annual value, until the whole debt was paid. Those English statutes were introduced and practiced under in Maryland; but none of them authorized the *selling* of lands so taken in execution in like manner as personal property. (*k*) In all cases, where, according to those English statutes, lands might be taken in execution and extended, the judgment gave to the plaintiff a general lien upon such lands as the defendant then held, or at any time

(*h*) 3 Blac. Com. 418, 420.—(*i*) 2 Inst. 391.—(*j*) Rawlings v. Carroll, 1 Bland, 76, note; Dorsey v. Campbell, 1 Bland, 365; Swan v. Swan, 3 Exch. Rep. 443.—(*k*) 11 Ed. 1; 13 Ed. 1, c. 18; 13 Ed. 3, stat. 3; 27 Ed. 3, c. 8 and 9; 36 Ed. 3, c. 7; 23 Hen. 8, c. 6; 2 Inst. 394; 3 Blac. Com. 418, 420; Killy Rep. 113, 141, 151; 1715, ch. 23, s. 6.

afterwards acquired while the judgment remained in force. (l) And consequently, if the defendant died after judgment, and before execution or satisfaction, the plaintiff might, as it would seem in England, and certainly here, without first proceeding against the executor or administrator to obtain satisfaction of his judgment, at once sue out a *scire facias* against the heirs and tenants of the land descended; and, upon no good cause being shewn, have execution against the lands; and thus enforce payment from the real assets, although there might be more than a sufficiency of personal estate of the deceased to discharge all his debts. (m)

But as those English statutes, which gave the right to have the lands extended for the satisfaction of debts, comprehended all the lands of the debtor, it therefore followed, that if, on his death after judgment, his lands passed into the hands of several, who, because of their being alike liable, were entitled to contribution from each other, they should be all summoned by *scire facias*; and if any one of the several heirs should be within age, the parol should demur as to all. (n) This right to contribution is an equity arising between those who are alike liable, because of the real assets in their hands. It is therefore only necessary, that the creditor should merely have them summoned, to enable each defendant to obtain justice for himself as against the others, without prejudice to the claim of the creditor; since it rests with the defendants alone to insist upon and have the contribution adjusted among themselves; for, if they, or any of them, on being summoned, fail to plead, that they are not liable, or that there are others who are liable, and who have not been warned; or to shew the extent of the contribution, the plaintiff shall have his judgment against those only who have been warned, which will be conclusive against them. (o)

But by the common law, where a debtor, by a writing under his hand and seal, binds himself and *his heirs* for the payment of a debt and dies, leaving real estate to descend to his heir, such heir is bound, in respect of such real assets descended, for the payment of the debt. And such bond creditor may, at his election, sue the

(l) 2 Inst. 469; *Jefferson v. Morton*, 2 Saund. 6; *Uderkill v. Devereux*, 2 Saund. 69, 71; *Harris v. Saunders*, 10 Com. Law Rep. 373.—(m) *Bricknold v. Owen*, Dyer, 208, pl. 15; *Stileman v. Ashdown*, Amb. 16; *Panton v. Hall*, Carth. 106; 2 Harr. Ent. 444, 749, 763, 767, 755.—(n) Co. Litt. 290; Bac. Abr. tit. Execution, B. 2, 4; *Sir William Harbert's Case*, 3 Co. 13.—(o) Bac. Abr. tit. *Scire Facias*, C. 5; *Michel v. Croft*, Cro. Jac. 506; *Jefferson v. Morton*, 2 Saund. 8, note 10; *Averall v. Wade*, 10 Cond. Chan. Rep. 495.

heir, or the executor or administrator of the deceased debtor. So that if the executor has assets, and the heir also has assets, it is still at the election of the creditor to have his debt of either the one or the other as he pleases. In the suit against the heir it is not necessary to allege, that the executor has no assets; for even if he has a sufficiency of assets, it is no defence for the heir. On the plaintiff's establishing his claim he may have judgment, that all the lands so descended be *extended*, at an estimated annual value, and delivered to him to hold until his debt is paid. And when the heir has paid debts to the value of the land he may hold it discharged from all other claims of the creditors of his ancestor. But, in such case, if any one of the heirs be an infant the parol shall demur as to all until such minor attains his full age. This is a mode of proceeding given by the common law to a specialty creditor against the heirs of the deceased debtor, by which such a creditor's title to obtain satisfaction from the property of the deceased is thus extended indiscriminately over the whole of his real and personal estate. (*p*) But if the heir pays such a bond debt of his

(*p*) *Davy v. Pepys*, Plow. 439; *Luson's Case*, Dyer, 81, pl. 62; *Quarles v. Capell*, Dyer, 204, p. 2; *Sir William Harbert's Case*, 3 Co. 12; *Davis v. Churchman*, 3 Lev. 189; *Haight v. Langham*, 3 Lev. 303, 304; *Buckley v. Nightingale*, 1 Strange, 665; *Smith v. Angel*, 7 Mod. 41; *Stileman v. Ashdown*, Amb. 16; *Kinaston v. Clark*, 2 Atk. 205; Bac. Abr. tit. Heir and Ancestor, F; 2 Harr. Ent. 106.

ANDERSON v. RAWLINS.—19th August, 1695.—JOWLES, Chancellor.—Whereas, heretofore, that is to say, on the 13th day of November, 1694, John Anderson, of Dorchester county, planter, did exhibit his bill of complaint, in the honourable Court of Chancery, against John Rawlins, son and heir of John Rawlins of the said county, planter, deceased, thereby setting forth, that whereas, the said John Rawlins the father, was, in his life-time, seised and possessed of a parcel of land, called The Inheritance, lying on the east side of Chesapeake bay, and on the eastern side of Blackwater river, in Dorchester county, aforesaid, whose lines are in the said bill expressed, containing, and laid out for three hundred acres, more or less: and that the said John Rawlins, the father, did, in his life-time, *to wit*: about the year of our Lord 1680, for the consideration of ten thousand pounds of tobacco, to him, the said John Rawlins, well and truly paid, by the said John Anderson, the complainant, agreed to sell and convey the said three hundred acres, called The Inheritance, to the said complainant, his heirs and assigns forever. And also, that he, the said John Rawlins, would, in some short time after, by himself, or his attorney thereunto authorized and appointed, make to the said complainant a firm conveyance of the same according to law, to be acknowledged and recorded in the said County Court of Dorchester county aforesaid; but, that before the said conveyance was perfected, he, the said John Rawlins, died, leaving John Rawlins, his son and heir, an infant, under the age of twenty-one years, by reason whereof the said complainant could not have a good estate made to him of the said three hundred acres of land, till the said John Rawlins, the son, should be of full age. And whereas, John Rawlins, the son, being satisfied, that the said complainant had bought and paid for

ancestor, then he may, by bill in equity, upon the ground, that the personal estate is there considered as the primary and natural fund for the payment of debts, obtain reimbursement from the personal estate, if any, in the hands of the executor or administrator. (q)

If however, a specialty creditor to whom the heir is bound, instead of suing at law, files his bill in equity to obtain satisfaction, by having the whole estate of his deceased debtor, real and personal, administered in equity for the benefit of himself and all other creditors; and, for that purpose, as he must, calls before the court the executor or administrator with the heir and devisee, if any, of the deceased, the court will, having both funds under its immediate and absolute control, without any material delay or injury to the creditors, order the personal estate, as the primary and natural fund, to be first applied, as far as it will go, in satisfaction of the debts; and thus, at once, place the burthen where it ought to rest; without allowing the creditors to enforce payment from the heir, as at law; and then leave him to seek reimbursement from the personal estate. (r) But if any one of the heirs, or, according to

the said land, did therefore assure the said complainant, that as soon as he came to age he would confirm the said land to the said complainant and his heirs forever, as aforesaid. And whereas, the said John Rawlins being since arrived to full age, hath been requested by the complainant to seal and execute a good and legal conveyance of the said land to the said complainant, and doth not absolutely deny to do the same; but is willing to do it to the said complainant and his heirs forever; provided, he may be saved harmless from his father's creditors. And forasmuch as the said complainant hath therefore prayed for the decree of this honourable court to force the said John Rawlins to complete the said conveyance to the complainant. And forasmuch as the said John Rawlins by his letter directed to the register of this honourable court, here in court produced and dated August the 13th, 1695, has declared, that he owns the said three hundred acres to have been bought from his father John Rawlins, deceased, by the complainant, and that he is content, that a decree of this honourable court shall pass, that the said John Anderson may have the said land to him and his heirs forever.

This honourable court upon hearing the whole matter in the bill and letter aforesaid contained, do order, adjudge and decree, that the said John Rawlins shall execute to the said John Anderson, such deed and conveyance of the said three hundred acres of land, as the said counsel of the said complainant shall devise or direct for the confirming the same to him and his heirs forever, with general warranty. And in the mean time the said complainant to hold and enjoy the said land free from all incumbrances whatsoever, to him and his heirs forever, according to the original contract made between the said complainant and the father of the said John Rawlins, as in the bill is mentioned.—*Chancery Proceedings, lib. P. C. fol. 305.*

(q) *Howell v. Price*, Prec. Cha. 477; *S. C. Gilb. Rep.* 106; *Armitage v. Metcalf*, 1 Cha. Ca. 74; *Anonymous*, 2 Cha. Ca. 4; *Popley v. Popley*, 2 Cha. Ca. 84; *Wolstan v. Aston*, Hard. 511; *Edwards v. Warwick*, 2 P. Will. 175; *Bootle v. Blundell*, 19 Ves. 518.—(r) *Plunket v. Penson*, 2 Atk. 51; *Madox v. Jackson*, 3 Atk. 406.

our act of Assembly, any other person claiming the real estate by purchase, be a minor, he cannot be compelled to answer the suit, but the parol shall demur as to all, until each infant attains his full age. (s)

It must, however, be borne in mind, that this mode of administering the assets of a deceased debtor, by applying his personal estate first to the payment of his debts, can only be done on a creditor's bill filed in this court; and according to all the authorities, it is only adopted here for the purpose of preventing that circuitry of action, which would be occasioned if the creditor were permitted to obtain satisfaction from the real estate, and thereby leave the heir to take his place, and go against the personalty for reimbursement. It is founded upon that equity alone, which subsists between the real and personal representatives of the deceased, to have the personal estate, as the primary and natural fund for the payment of debts, first applied for that purpose. And being an equity which arises only as between the heir and executor, it is one by which the rights of a creditor can in no way be affected, and with which he can have no concern; since it is well settled, that upon the establishment of his claim in point of fact, he has a clear legal right to enforce satisfaction, at his election, from either the heir or the executor. The court has but two points to consider. First, that there is a debt presently due—and secondly, not to sell real estate, while there is personalty available. But this does not mean, that if debts are due to the estate, the creditor is not to be satisfied until they are collected. The court will order immediate application of such funds as are immediately available, and then resort to the real estate, without waiting for the coming in of other personal effects, which may become capable of being applied within a shorter or longer period of time. (t)

And, therefore, as it is not necessary at law for a creditor to found his title to recover upon any allegation or proof, that the executor has not a sufficiency of assets, (u) so it cannot be necessary, that he, the creditor, should make and sustain any such allegation to enable him to obtain satisfaction out of the real estate by the aid of a Court of Chancery. On the contrary, according to the English precedents, so far from the creditors alleging an insufficiency of the personal estate for the payments of debts, as a foun-

(s) 1729, ch. 24, s. 16; Co. Litt. 290; 3 Blac. Com. 300; Markal's Case, 6 Co. 4.—(t) *Clanmorris v. Bingham*, 12 Cond. Chan. Rep. 254.—(u) *Davy v. Pepys*, Plow. 439.

dation for a sale of the realty for that purpose, it is there usually charged, in a creditor's bill, that the deceased's personal estate was more than sufficient to satisfy all his debts, as well those due by specialty as by simple contract, &c.; but, that if the personal estate be insufficient, that then the specialty debts be paid out of the deceased's real estate, that the executor account; that the real estate be sold, &c. And, consequently, in all such cases, if it be supposed, that there are personal assets which may be applied in aid of the realty, the issue, as to that fact, founded on this equity, must be presented by the heir; and be made up between him and the executor or administrator alone, as it clearly lays with the heir only to allege and shew that fact for his own benefit; which if he fails to do, the creditor, whose legal rights cannot in any way be impaired or controlled by the court, must be allowed to obtain payment by a sale of the realty. (*w*)

Thus stood the law of Maryland until the year 1732, when the British parliament passed an act, by which it was declared, 'that from and after the said twenty-ninth day of September, one thousand seven hundred and thirty-two, the houses, lands, negroes and other hereditaments and real estates, situate or being within any of the said plantations belonging to any person indebted, shall be liable to and chargeable with all just debts, duties, and demands of what nature or kind soever, owing by any such person to his majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process in any court of law or equity, in any of the said plantations respectively for seizing, extending, selling or disposing of any such houses, lands, negroes and other hereditaments and real estates, towards the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of the said planta-

(*w*) *Wolstan v. Aston*, Hard. 511; *Anonymous*, 2 Cha. Ca. 4; *Popley v. Popley*, 2 Cha. Ca. 84; *Mead v. Hide*, 2 Vern. 120; *Tipping v. Tipping*, 1 P. Will. 729; *Edwards v. Warwick*, 2 P. Will. 175; *Knight v. Knight*, 3 P. Will. 332; *Anonymous*, 9 Mod. 66; *Williams v. Williams*, 9 Mod. 299; *Lutkins Leigh*, Ca. Tem. Talb. 54; *Galton v. Hancock*, 2 Atk. 435; *Stileman v. Ashdown*, 2 Atk. 609; *Walker v. Jackson*, 2 Atk. 624; *Daniel v. Skipwith*, 2 Bro. C. C. 155; *Rowe v. Bant*, Dick. 151; *Hamilton v. Worley*, 2 Ves. jun., 63; *Aldridge v. Wallscourt*, 1 Ball & Bea. 312; 2 Fonb. 286; Will. Exrs. 1042; 2 Harr. Prac. Cha. 323; 2 Newl. Pra. Ca. 13; *Willis' Eq. Plea*. 222; *Clanmorris v. Bingham*, 12 Cond. Chan. Rep. 254.

tions respectively are seized, extended, sold or disposed of for the satisfaction of debts.' (x)

This British statute was first introduced, used and practised under here about the year 1740, and has been continued in full force ever since. (y) The previous English statutes which gave the right to have lands taken in execution and delivered to the creditor at an extended annual value until the debt was paid, if not virtually repealed by this act, yet having given a remedy so inferior, or comparatively so ineffectual, were never resorted to after the introduction of this statute; no previous legislative enactment had expressly authorized a creditor to have his debtor's lands taken in execution and *sold* for the payment of the debt; although it is said that the Court of Chancery would, under some circumstances, accelerate the payment of the debt by ordering a sale of a moiety, or so much as might have been *extended* at law. (z) This statute removed all difficulty, in that respect, by putting simple contract and bond creditors upon the same footing, and by allowing the real estate to be seized and *sold* for the satisfaction of debt in like manner as personal estate.

Under this law it seems, however, to have been always considered here, that an heir should not be held liable to an action at common law by a simple contract creditor, merely in respect of the real estate descended, (a) and therefore, as the statute had expressly declared, that the real estate should be liable to all debts in like manner as real estates were by the law of England liable to the satisfaction of debts due by bond, it necessarily followed, that simple contract creditors could only obtain satisfaction from the real estate of their debtor, in the hands of his heirs or devisees, by a creditor's bill in Chancery, governed by rules here, similar to those by which a creditor's bill by a bond creditor in England were regulated, and as this statute was avowedly made for the *benefit* of creditors, to enlarge, not to narrow their remedy, it must have left their title and their right to enforce payment, at their election, from the real or the personal estate, unimpaired and unprejudiced by any equity which then existed only between the real and personal representatives of the deceased; or which arose only out of the mode of administering the estate for the benefit of the heirs

(x) 5 Geo. 2, c. 7.—(y) Davidson's Lessee v. Beatty, 3 H. & McH. 612.—(z) Stileman v. Ashdown, 2 Atk. 609; S. C. Amb. 16.—(a) Lodge v. Murray, 1 H. & J. 499; Gist v. Cockey, 7 H. & J. 140.

alone. (b) And as this statute deprived infants of none of their privileges, it followed, that if any one of the claimants of the real estate proposed to be charged, was a minor, the parol should demur for the benefit of all until he attained his full age. So too, as to all other particulars, not expressly or necessarily embraced by this statute, the then existing law remained in all respects unaltered.

After which it was declared by an act of Assembly, that persons under age seised of any lands chargeable with the payment of money; and therefore, *liable to a decree for a sale*, should by direction of the Court of Chancery, on the petition of the person entitled to any money with the payment whereof the said lands were chargeable, convey and assure such lands in such manner as the court should direct to any other person; and such conveyance should be as good and effectual as if such infants were at the time of full age: provided, that no direction, as aforesaid, should be given in case of any infants seised of any lands subject to the payment of money, unless it should appear that the *guardian* of such infant *had consented* thereunto; and also, that such infant would not sustain any inconvenience from such direction. (c) Under this law, which relates only to proceedings in Chancery, any lands, subject to the payment of debts, held by an infant, might have been sold, with the consent of his guardian, without allowing to the infant the privilege of having the parol to demur until he attained his full age. But this act contains not the slightest allusion to any distinction between the application of the real and personal estate of a deceased debtor to the payment of his debts; nor is susceptible of being so construed as to have any bearing injurious to the legal rights of his creditors; or so as to make the least change in that equity, which arises in a creditor's suit, between the real and personal representatives of the deceased, by which the heirs are allowed, for their own peculiar benefit, without prejudice to creditors, to have the personal estate first applied in payment of his debts. In these respects the then existing principles of law and equity have not been altered or affected in any way whatever by this act of Assembly.

By the act of Assembly which prescribes the mode of reviving actions at common law, which may have abated by the death of

(b) *Cox v. Callahan*, 2 Bland, 51, note; *Long v. Baker*, 2 Haywood, 128.—(c) 1773, ch. 7; 1778, ch. 22; *Prutzman v. Pitesell*, 3 H. & J. 50; *Partridge v. Dorsey*, 3 H. & J. 320, 305; *Pue v. Dorsey*, 1 Bland, 139, note

either party, it is provided, that upon the death of either plaintiff or defendant in any such action, involving the title to land, if the heir or devisee of the deceased be an infant, such action shall not be tried during his minority; unless his guardian, or next friend, satisfy the court, that it will be for his benefit. (d) And in the same act of Assembly it is declared, that in the payment of the debts of deceased persons, no creditor shall be entitled to any priority, except such as have obtained judgment against the deceased; nor shall any preference be given to creditors in equal degree by the executor or administrator, who shall observe the following rules, where it is apprehended the deceased has not left personal estate sufficient to satisfy the debts due by him; *to wit*; to pay no debt until the end of twelve months after the death of the deceased; to give notice for all his creditors to produce their claims after the expiration of that time at a certain day and place properly authenticated, when the executor shall first discharge all judgments in full, or equally and in due proportion; and next shall divide the assets equally among all other creditors, without priority or preference, &c. And if any executor or administrator shall not observe these rules, he shall be liable to pay, out of his own estate, the loss sustained by any creditor in consequence thereof. (e) And in case there be no personal estate sufficient to pay the debts of the deceased, and he shall have left lands to descend, or hath devised the same, and the heir or devisee may be liable to pay the debts of the deceased, to the value of the lands descended or devised, then such heir or devisee, being of full age, shall pursue the rules aforesaid, in the payment of the debts of the deceased; and upon default, such heir or devisee shall be liable to pay out of his own estate the loss sustained by his misconduct or neglect. And that all courts of law and equity shall observe the directions of this act. (f)

It is clear, from the language of this law, that, as regards the privileges of infants, its provisions are confined altogether to actions at common law; and that, as regards the administration of deceased persons estates, it merely prescribes rules for the payment of debts, by which executors and administrators, as well as adult heirs and devisees, so far as they may be liable in respect of assets, are alike to be governed. This law apparently recognizes the rule in equity, that the personal estate is the primary and natural

(d) 1785, ch. 80, s. 2; 3 Blac. Com. 300.—(e) Altered by 1798, ch. 101, sub ch. 8.—(f) 1785, ch. 80, s. 7; Webster v. Hammond, 3 H. & McH. 131.

fund for the payment of debts; but there is no expression in it which can be so construed as to lessen or impair the previously existing legal rights of creditors; or which intimates an intention to prevent a specialty creditor from suing and enforcing payment at common law from the heir alone, in respect of real assets descended to him; or which would prevent a simple contract creditor, under a creditor's bill in Chancery, from obtaining relief upon the same principles, and to the same extent as a bond creditor from the heirs or devisees of the deceased in respect of the real assets held by them. It may be safely assumed, therefore, that this act of Assembly has made no change whatever in the law as regards the matter now under consideration.

By another act of Assembly it has been enacted, 'that if any person hath died, or shall hereafter die, without leaving personal estate sufficient to discharge the debts by him or her due, and shall leave real estate which descends to a minor, or person being idiot, lunatic, or *non compos mentis*, or who shall afterwards become *non compos mentis*, or shall devise real estate to a minor, or person being idiot, lunatic, or *non compos mentis*, or who shall afterwards become *non compos mentis*, the Chancellor shall have full power and authority, upon application of any creditor of such deceased person, after summoning such minor, and his appearance by guardian, to be appointed as aforesaid, and hearing as aforesaid, or after summoning the person being idiot, lunatic, or *non compos mentis*, and his appearance by trustee, trustees or committee, to be appointed as aforesaid, and hearing as aforesaid, and the justice of the claim of such creditor is fully established, if, upon consideration of all circumstances, it shall appear to the Chancellor to be just and proper that such debts should be paid by a sale of such real estate, to order the whole or part of the real estate, so descended or devised, to be sold for the payment of the debts due by the deceased.' (g)

On advertng to the law as it has been shewn to have existed when this act of Assembly was passed, it will be seen, that a specialty creditor, to whom the heir was bound by the contract, had an unquestionable right to proceed, at his election, against the heir, or the executor of his deceased debtor; that there being a sufficiency of personal estate to pay the debt was no defence for the heir; that if the heir paid the debt he might, by bill in

equity, obtain reimbursement from the personal estate, if any, in the hands of the executor or administrator; that if a creditor sued in equity, and it was alleged and shewn, by the heir, that there was personal estate, then that estate was first applied, and the realty only sold to make up the deficiency; and that in all cases, where any one of the claimants of the real estate was an infant the parol should demur as to all until such minor attained his full age.

Hence it appears, that a creditor's right to proceed against the real estate of his debtor in no way depended upon the insufficiency of his personalty, and it is most manifest, from a fair reading of this act of Assembly, obviously made for the *benefit* of creditors, that the legislature could not have intended to throw in the way of a creditor any new obstacle or hindrance to the recovery of his debt in any form whatever. It could not have been intended to engraft upon the former law a condition precedent, requiring a creditor to show, as a foundation of his claim to obtain satisfaction from the realty, that the personalty had been exhausted; or to require him first to shew the amount to be raised by a sale of the realty to make up for the deficiency of the personalty; although the court may, to avoid unnecessary injury to the heir, and at his instance, first call in the creditors and have an account of the personal estate taken, in order to ascertain how much of the real estate should be sold. (*h*) A specialty creditor might, at his election, by an action at common law, enforce payment from the heir, without regard to the amount of the personal assets held by the executor or administrator. And, if such specialty creditor went into a court of equity for relief, he carried with him there this legal right to obtain satisfaction unembarrassed by any question as to assets between the heir and executor. The Court of Chancery, recognizing the existence of such legal right, always so regulated its proceedings, as, in doing justice between the heir and executor, in no way materially to delay or prejudice the claims of creditors.

Simple contract creditors having, by the British statute of 1732, been put upon a footing with specialty creditors, the Court of Chancery here, in creditors' suits, always, since the adoption of that statute, applied the same rules and principles to the claims of

(*h*) *Strike's Case*, 1 Bland, 85; *Galphin v. McKinney*, 1 McCord, 294; *Clanmorris v. Bingham*, 12 Cond. Chan. Rep. 251.

simple contract creditors, that it had before applied to cases arising on the claims of specialty creditors. And consequently, it never, in any case, threw upon a creditor the necessity and burthen of alleging and proving the insufficiency of the personal estate of the deceased, as forming an essential part of his title to obtain satisfaction by a sale of the realty; because that was a fact which, from the nature of things, unacquainted as he must be with his debtor's private affairs, it would, in most cases, be impracticable for him to shew; and was, therefore, a matter with which he had no concern. And as equity is bound to follow the law, the court could not upon any principle whatever throw upon the creditor any such burthen. The allegation of the sufficiency of the personal estate can only come from the heir, because it would be of no avail to any other party; and as the benefit which the heir was allowed to derive from it, was only as against the personal estate, the issue as to the truth of such allegation was therefore, one which could only, with propriety, be made up between the heir and the executor or administrator. The first clause of this act of Assembly, it is evident, merely refers, in general terms, to these principles of equity, without making the least change in any of them, or intimating, that a creditor, in suing by bill in Chancery, was to encounter any new obstacle in any form. So far, therefore, this act of Assembly recognizes and affirms the then existing law without making any alteration in it whatever.

In regard to persons *non compos mentis*, as spoken of in this act, it will be sufficient to observe, that although the Chancellor, in the exercise of his jurisdiction, in cases of lunacy, has no power to exempt either the person, or the estate of the lunatic from the claims of his creditors; yet, where circumstances permitted, it had always been deemed to be within the scope of his authority so to order the management, or sale of a lunatic's estate as to secure to him a maintenance from the proceeds of his property; and, for that purpose, to postpone the payment of his debts by an immediate sale or application of the capital of his estate as far as practicable. (i) It is to these dilatory proceedings of the court, for the benefit of persons *non compos mentis*, that this provision of this act relates. And as it merely authorizes a sale to be made in cases where, independently of this act, a sale might have been enforced under the statute of 1732, this act must be understood as only in-

(i) Shelf. Luna. 356; *Ex parte Dikes*, 8 Ves. 79; *Ex parte Philips*, 19 Ves. 123.

tending to declare, that there shall be no postponement or delay, for the benefit of a person *non compos mentis*, to the prejudice of creditors. Considered in that way, and it can be considered in no other, it has certainly made no very material change in the law. (*j*)

This act declares, that on the justice of the claim of such creditor being fully established, if, upon consideration of all circumstances, it shall appear to be just, that such debt should be paid by a sale of the real estate, the court may order the whole or a part of it to be sold. A plaintiff must, in all cases, establish the justice of his claim; in all cases the order passed by the court must appear to it to be just; and in no case ought more of a debtor's property to be taken from him than is necessary to pay his debts. In these particulars, therefore, this act of Assembly is simply an affirmation of the previously settled law, and nothing more.

But we have seen, that, under the law before this act of Assembly was passed, if any one of the claimants of the real estate was an infant, the judicial proceedings were to be stayed, or the parol demurred, as against all until the minor attained his full age. This privilege of infancy had, in England, been considered as a pernicious and grievous hindrance to creditors; (*k*) and had become much more so here after the adoption of the statute of 1732, when it was so frequently relied on to break, for a time, the promise of ample justice held out by that statute. The act of Assembly which allowed of a sale of the real estate during the infancy of the heir, with the consent of his guardian, was a poor mitigation of the evil, as it still left the creditor at the mercy of his debtor. But this privilege of infancy, if it had been suffered to remain, at this day, after the introduction of partible inheritances, by the act to direct descents, would have been still more grievous, or altogether insufferable, as it might have been interposed as a suspension of the relief prayed by a creditor, in so many cases, and for such a length of time, in the great majority of them, as to have amounted to an almost total repeal, as to the heirs of deceased debtors, of the statute of 1732, by which lands were made liable to be sold for the payment of debts. But this act of Assembly has authorized the appointment of a guardian to answer and defend for the infant heirs, so as to enable the creditor, at once, to substantiate his case, and establish his claim; and thereupon to obtain a decree for a sale

(*j*) *Williams v. Whinyates*, 2 Bro. C. C. 399.—(*k*) 3 Blac. Com. 430; *Plasket v. Beeby*, 4 East. 485.

of the real estate, in like manner as if the heirs were of full age, without allowing the parol to demur. In this respect this act of Assembly has made a most important and valuable change in the law in favour of creditors; and this is indeed the only material alteration which it has made in the pre-existing law.

Owing to some strange mistake as to the operation of what appears to be the very clear and unambiguous language of the statute of 1732, a notion appears to have been entertained by a few, and for some time, that as it was only under this act of Assembly, that the real estate of a deceased debtor could be sold for the payment of his debts; and that as its provisions applied only to *infant heirs*; that, therefore, there was no method by which a simple contract creditor could obtain satisfaction by a sale of his deceased debtor's real estate in the hands of his *adult heirs*. (*l*) To remove all misapprehension of the law, in this particular alone, it was in relation to this matter specially declared, 'That the provisions of the fifth section of the said act (1785, ch. 72,) and of the several acts supplementary thereto, in relation to the sales of real estate, be extended to defendants of full age.' (*m*) But the legislative enactment thus extended was manifestly made, as has been shewn, for the *benefit* of creditors; and therefore, if its language could be deemed ambiguous, certainly it could not be so construed as to curtail or embarrass their rights. And as it has been shewn, that there being assets in the hands of the personal representative could not prevent a specialty creditor from enforcing payment from the heir, who was bound to the extent of assets descended; and that there was nothing in the act, thus extended, which could have been intended to diminish that legal right of specialty creditors, or to circumscribe its operation in favour of all creditors, in a Court of Chancery, since the adoption of the statute of 1732; it necessarily follows, that, by having its provisions extended to defendants of *full age*, whatever of doubt or misapprehension may have been removed, no alteration whatever can have been made in the law, in this, or in any other respect, prejudicial to the interests of creditors.

Before we take leave of this subject, it may be well to advert to the case where there is no heir or devisee of the deceased, and the real estate of the deceased debtor reverts by escheat to the state—although in England and in Maryland, the state, upon the principles of the feudal system, took by escheat clear of the claims of

(*l*) Tyson v. Hollingsworth, 2 Bland, 327, note.—(*m*) 1818, ch. 193, s. 2.

general creditors, it seems to have been a matter of course to direct all creditors to be paid out of the confiscated or escheated property of their debtor. Yet as the state could not be sued or in any way coerced to make any such application of property, taken or fallen into its hands; (n) it was declared, that in case any person should die seised of any lands intestate, without heirs and indebted, and not leave personal estate sufficient to pay his debts, any of his creditors might file a petition in Chancery suggesting such facts, and praying that such real estate might be sold for the payment of the debts of the deceased; and the Attorney-General upon notice should appear and defend. Upon which the Chancellor being fully satisfied of the truth of such facts might order a sale of the real estate, &c.; which if not sufficient to pay all the debts, the money arising from the sale should be equally distributed among all the creditors in proportion to their debts *without any preference*; and upon any certificate of survey being made and returned in consequence of an escheat warrant, any creditor of the deceased might enter a *caveat* to the same, &c. (o) After the passing of some private acts to remove difficulties in cases of this kind; (p) it was, by another general act declared, that in case any person seised or possessed of land, or having an equitable interest therein should die without leaving any known heir or devisee, and without leaving a sufficient personal estate for the payment of his debts contracted within this state, or with any of the citizens thereof, the Chancellor upon the application of any such creditor might order the real estate to be sold, &c. (q.)

These legislative enactments, on a careful consideration of them, it will be perceived, do, in effect, declare, that a creditor may, where there are no heirs or devisees, proceed against the state itself to obtain satisfaction from the realty of his deceased debtor in the hands of the state. And this privilege has been granted to creditors by the first of these laws, so far as it may not have been virtually repealed by the last of them, upon the terms, if there should not be enough to pay all, that the proceeds of sale should be distributed in due proportion, *without any preference*; and that none

(n) Jones v. Goodchild, 3 P. Will. 33; Bedford v. Coke, 2 Ves. 116; Burgess v. Wheate, 1 Eden, 203; Middleton v. Spicer, 1 Bro. C. C. 202; Megit v. Johnson, 1 Doug. 542; Robert Fuller's case, 14 May, 1680; *Land Record*, lib. C. B. 45; John Webster's case, 27 November, 1680; *Land Records*, lib. C. B. 60, 102.—(o) 1785, ch. 78, s. 1.—(p) 1789, ch. 33; 1792, ch. 44.—(q) 1794, ch. 60, s. 3, 6.

but such creditors as are *citizens of this state* (r) should be allowed to come in and have the real estate sold for the payment of their debts in the manner prescribed. These legislative provisions it is obvious have relation to peculiar cases, to which the state is a party, and do not in any way affect the rights of a creditor against the heirs or devisees, executors or administrators of his deceased debtor.

From this review of the law in relation to the matter now under consideration, it is therefore perfectly clear, even admitting that the defendants have relied upon the fact, that the plaintiffs had failed to allege and prove, that the personal estate of *William Wyse* deceased, was insufficient to pay his debts, it can be of no avail to them as a defence against the claim of these plaintiffs to obtain satisfaction by a sale of the real estate of the deceased in their hands; since, if it be true, that there is a sufficiency of personal estate to pay the debts of the deceased, it rests with these heirs alone to allege and shew that fact, and how that estate may be now so applied for the saving of their own interests. But as these heirs have failed to do so, the real estate in their hands must certainly be held liable, at least so far as the personal estate may be insufficient, as it now appears to be upon the face of these proceedings.

But the proofs show that although the personal estate might originally have been more than sufficient to pay this debt, it has since, by some means or other, fallen greatly short. Admitting then that there has been a waste of the personal assets; do these heirs and next of kin stand here as persons having no interest in the personality, or having no concern with this apparent misapplication of it? And has the conduct of the plaintiff *Tessier*, been such, that the loss must fall entirely upon him?

It is clear that an account of an administrator passed by the Orphans Court must be received as *prima facie* evidence of the then truth of the facts stated in it, at least as against the administrator; and therefore it must be assumed, until the contrary is shewn, that the administratrix *Rachel Wyse*, on the 29th of June, 1816, had in her hands a sufficiency of assets to pay this debt. But the strongest proof which could be adduced of that fact, would not preclude her from shewing, in answer to the claim of a creditor, made at a subsequent period, that she had since disbursed the whole amount,

(r) Corrie's case, 2 Bland, 495.

then in her hands, in a due course of administration, so as to relieve herself from all liability. To discharge herself from all claims in respect of the assets thus admitted to have been in her hands, it certainly cannot be deemed to be incumbent upon her to do so by subsequent accounts passed by the Orphans Court; it would be sufficient for her to shew, by any kind of legal proof, that she had fully and properly administered the assets then on hand. There is here, however, no such proof of her having properly applied any portion of the assets held by her on the 29th of June, 1816. But all the peculiar circumstances of this case must be carefully considered in order to obtain a clear view of the manner in which the personal estate then in the hands of the administratrix *Rachel Wyse*, has been consumed and reduced to the amount now found in the hands of the administrator, *de bonis non*, *Allender*.

It appears, that the deceased debtor *William Wyse*, at the time of his death, was seised and possessed of a considerable real and personal estate, which passed into the hands of his widow as administratrix, and his eight children, now here as defendants, and who were his heirs and next of kin; most of whom were then under age, and all of whom have been maintained, and the minors educated, as we are left strongly to infer, from the estate by their mother and natural guardian, the administratrix; that the administratrix *Rachel Wyse*, with this defendant *John M. Wyse*, by their petition addressed to this court, before the institution of this suit, stated, that the personal estate of the deceased was not sufficient to maintain and educate his children; and therefore they prayed to have the tract of land called Deer Park sold, as directed by him for that purpose; which was decreed accordingly; thus distinctly giving the court to understand, in that suit, that the mother and natural guardian of these infants had, had no hesitation in applying the personal assets, in her hands as administratrix, to their maintenance and education. And it further appears, that this plaintiff *Tessier*, had pressed for the payment of his debt, by suing and obtaining judgments upon his collateral security, which judgments have, by accident, been left wholly ineffectual. Hence, although it is not directly shewn how the children were maintained; yet on looking to the nature of the estate as described in the inventories and proceedings, and to the probable cost of maintaining and educating them for about eight years, the irresistible presumption is, that the amount of the difference between the assets shewn to have been in the hands of *Rachel Wyse*, on the 29th of June, 1816, and

the assets shewn to be in the hands of *Joseph Allender*, on the 23d of January, 1824, had been consumed chiefly or altogether by these very heirs and next of kin of the deceased, who are now here as defendants resisting the payment of this claim from the real estate in their hands. (s)

A creditor cannot be held bound to guarantee the faithful and proper administration of his deceased debtor's estate; and therefore where, without any fault or connivance of his, the executor or administrator wastes the personalty, the entire residue of the estate real and personal must be held as absolutely liable to such creditor, in all respects, as if no such waste had been committed, or as if the estate had been justly applied in a due course of administration. (t) But here, under these circumstances, a court of equity cannot, certainly, tolerate such a defence as this, that there was originally a sufficiency of personal estate to pay all the debts of the deceased, coming, as it does, from defendants who are both heirs and next of kin, and for whose maintenance and education the personal estate had been thus reduced, so as to exclude a creditor from the real estate in their hands, upon the ground of there having been originally a sufficiency of personal estate to pay the debt. Because if there has been, in contemplation of law, a waste of the personal estate, it was a misapplication of it in which they have largely participated; and because, if there has been any negligence in the plaintiff *Tessier*, it was a sort of indulgence by which they have been greatly benefited. Such a defence comes with an exceedingly ill grace from those of these defendants who are the heirs and next of kin of the deceased; and therefore cannot, under the circumstances in which they stand, be allowed to avail them, or the defendant *Riston* who claims under them, in any way whatever; (u) but the real estate in their hands must be held liable, as in cases where a third person is held liable, because of his collusion with the administrator in misapplying the assets. (w)

It is here stated and admitted, that the administratrix *Rachel Wyse* had in her hands all the personal estate of the debtor *William Wyse* deceased; and that she died without having accounted for what she admitted she had in her hands on the 29th of June, 1816.

(s) *Allender v Riston*, 2 G. & J. 86.—(t) *Hardwick v. Mynd*, 1 Anstr. 112.—(u) *Williams v. Williams*, 9 Mod. 300; *Daniel v. Skipwith*, 2 Bro. C. C. 155.—(w) *Elmslie v. M'Aulay*, 3 Bro. C. C. 624; *Doran v. Simpson*, 4 Ves. 651; *Alsager v. Rowley*, 6 Ves. 749; *Benfield v. Solomons*, 9 Ves. 86.

Her personal representative has not been made a party to this suit, nor has it been in any way stated, or shewn, whether she died intestate or not; whether or not administration of her estate has been granted to any one; or whether she left any personal estate to be administered or not. Yet according to the general rule, that an executor or administrator of a deceased executor or administrator of the deceased debtor, who, at the time of his death, had assets in his hands, must be made a party to enable the court to obtain a complete account of the whole personal estate of the deceased debtor, so as to do justice to all by having the personal estate applied in the first place in discharge of the inheritance; (x) it is clear, that the executor or administrator of *Rachel Wyse* should have been brought here as a party, if it does not appear upon the face of these proceedings, why such a party has not been, could not be, or need not be called before the court. (y)

We have seen that in the case of the death of a debtor, after judgment, the *scire facias* against the heirs and terre-tenants must warn them all to appear; and that in equity the personal representative must be made a party with the heirs. But the reason why all the terre-tenants in the one case, and the executor or administrator in the other, must be brought before the court, is, as has been shewn, not to enable the creditor to recover; but that the defendants may be enabled to obtain the contribution from each to which they are respectively entitled, or that the personalty may be first applied in aid of the realty, so that the burthen may be at once placed where it ought to rest, and no unnecessary injury done to any one.

This considered as a right, existing only among such defendants, is one which a terre-tenant may decline to take advantage of; (z) or an heir may even verbally disclaim. (a) But where the reason ceases the law ceases; and therefore, it has been held, in a suit of this kind, that when two persons are entitled, one to the personal estate, and the other to the real, as the court cannot do justice to him who has the real estate, without taking an account of the personal in the first place, in relief of the real estate, both of them must be made parties; but that when the same person had both funds in him, it could not be indispensably necessary to

(x) *Williams v. Williams*, 9 Mod. 299; *Holland v. Prior*, 7 Cond. Cha. Rep. 22.—
 (y) *Hammond v. Hammond*, 2 Bland, 307.—(z) *Jefferson v. Morton*, 2 Saund. 9,
 note 10.—(a) *Clinton v. Hooper*, 3 Bro. C. C. 214; S. C. 1 Ves. jun., 188.

have any such account taken; because it was immaterial, as to such person, out of which fund, the real or personal estate, the debt was paid—and therefore the suit was allowed to proceed against his heir without making his personal representative a party. (b) So here, these children of *William Wyse*, deceased, being entitled to the real estate as his heirs, and to the personal as his next of kin, they had both funds in them, the realty by descent, and the personalty left in the hands of *Rachel Wyse*, the late administratrix, as next of kin: so circumstanced, it is immaterial as to them, out of which fund the debt is paid, whether from the real or the personal estate; since, as the plaintiff's claim has been established, it must, in any event, be satisfied out of property to which they would otherwise be entitled. And therefore it appears upon the face of these proceedings, that the suit may well be permitted to go on without making the personal representative of *Rachel Wyse*, deceased, a party.

Supposing, however, all that has been said as to the liability of these heirs in respect of the real estate in their hands, to be erroneous; yet there cannot be a doubt as to the liability of this administrator *de bonis non*, *Joseph Allender*, to the extent of the assets he admits he has in his hands. As against him, the claim of the plaintiff *Tessier*, is unquestionable, and in every point of view incontrovertible. The defendant *Allender*, it is true, states his ignorance of it in some particulars; but he has sustained no manner of defence against it; and therefore, upon every ground of law and equity, the plaintiff *Tessier*, must be entitled to obtain satisfaction to the full amount, or at least, to the extent of a due proportion of the assets admitted to be in the hands of this administrator *de bonis non*. So that if this bill were to be totally dismissed as against these heirs, and *Riston* who claims under some of them, as regards the realty; yet it must be sustained as a creditor's suit against this administrator *de bonis non*, alone; since it has been firmly and well settled, by a long course of practice, that this court may, under a bill of this kind, assume the administration of the personal estate, for the benefit of all the creditors of the deceased, at the instance of any one creditor on behalf of himself and others, as against the executor or administrator

(b) *Williams v. Williams*, 9 Mod. 300; *Daniel v. Skipwith*, 2 Bro. C. C. 155; *Holland v. Prior*, 7 Cond. Cha. Rep. 25; *Tyson v. Hollingsworth*, 2 Bland, 330, note.

alone. (c) So far as the personal assets in the hands of this administrator *de bonis non* will go, the plaintiff *Tessier*, must have awarded to him the relief he asks, even if he should have to turn round afterwards to recover the unsatisfied balance of his claim by a suit upon the administration bond of the late administratrix *Rachel Wyse*; as I can see no plausible, legal or equitable pretext for requiring him to sue upon that bond before he is allowed to obtain the relief he now seeks against this administrator *de bonis non*.

Upon the whole I am clearly of opinion, that this bill may well be sustained against these defendants as a creditor's suit, notwithstanding its alleged defect in not expressly charging, that the personal estate of the deceased was insufficient to pay his debts. The claim of the plaintiff *Tessier*, has been established by proof demonstrative and satisfactory; it has not been shewn that any fraud, wilful default, or breach of trust can be imputed to him; and it has been shewn that the personal estate of the deceased is, at this time, greatly inadequate to the payment of the plaintiff's claim alone. From which it is clear, that the real estate must be sold, and may be at once sent into the market for that purpose, while the court is engaged in calling in the creditors, and having an account taken of the personalty. I shall therefore decree accordingly.

Decreed, that the defendant *Joseph Allender*, account with the complainants of and concerning the personal estate of *William Wyse*, deceased, and the proceeds thereof which may have come to his hands, or be claimed by him as administrator. That for the purpose of making a final settlement and distribution of said estate, the said administrator *Allender*, is required to make sale of all the goods and chattels now remaining in his hands. And the auditor is directed to state the account from the pleadings and proofs now in the case, and from such other proofs as the parties may lay before him. And the parties are authorized to take testimony in relation to the account before the commissioners in the city of Baltimore, or before any justice of the peace elsewhere, on giving three days notice as usual: *Provided*, that the testimony be taken and filed in the Chancery office, on or before the first day of November next.

(c) 1 Mad. Cha. Pra. 578; Metf. Plea. 166; *David v. Frowd*, 7 Cond. Cha. Rep. 8; *Hammond v. Hammond*, 2 Bland, 307; *The Bank v. Dugan*, 2 Bland, 254.

Decreed, that the real estate in the proceedings mentioned, whereof the late *William Wyse* died seised, be sold for the payment of his debts; that *John Scott* be appointed trustee to make the sale, &c., the terms of which shall be as follows: One-third of the purchase money to be paid in six months from the day of sale, one other third in nine months from the day of sale, and the residue in twelve months from the day of sale, the whole to bear interest from the day of sale, and to be secured by bond with surety to be approved by the trustee, &c. And the trustee, at the time of advertising the property for sale, shall give notice to the creditors of the said late *William Wyse*, to file the vouchers of their claims in the Chancery office, within four months from the day of sale.

The plaintiff *Tessier*, by his petition on oath, stated, that the defendants before and since the passing of the decree, and then were felling, carrying away and selling timber and other trees from the land of which *William Wyse* died seised, and which had been ordered to be sold by the decree; and that the whole of the real estate of the deceased would be insufficient to pay the plaintiff's claim. Whereupon it was prayed, that an injunction might be issued to restrain the defendant from committing waste, &c.

7th October, 1830.—BLAND, *Chancellor*.—It has always been understood here, that such a decree as this on a creditor's suit requiring the personal representative to account, and directing the real and personal estate to be sold for the payment of the debts of the deceased, virtually puts the property into the possession of the court, and places it under its immediate control and protection for the benefit of all concerned; so that, on application for that purpose, the estate may, until a sale can be effected, be disposed of to the best advantage, or immediately protected from injury and loss. (d) Therefore let an injunction issue as prayed.

The defendant *Matilda Wyse*, by her petition, on oath, stated, that she did not attain the age of twenty-one years until the 16th of June, 1830, and believes, from the information she has received, that she can be enabled to produce testimony which would have an important bearing on the merits of the plaintiff's claim, and tend to prove that he had no such claim as entitled him either legally or equitably to have a sale of the real estate of the de-

(d) *Shewen v. Vanderhorst*, 4 Cond. Cha. Rep. 461; *Duvall v. Waters*, 1 Bland, 76.

ceased; and that the defendant *Margaretta Wyse*, died on the 19th of April, 1830, and her representatives, as such, have not been made parties. Whereupon it was prayed, that the decree might be rescinded, and the case reheard; and that she might be permitted to answer, &c.

Upon which an order was passed, directing that the matter of the petition should stand for hearing on the 12th of October then next; and that all further proceedings under the decree should be suspended until further order; provided, that a copy be served, &c.

13th October, 1830.—BLAND, *Chancellor*.—The petition of *Matilda Wyse*, standing ready for hearing, and having been submitted on notes by the solicitors of the parties, the proceedings were read and considered.

It is admitted, that previous to the death of *Margaretta*, the case had been set down for hearing. It is not alleged or shewn, that the interests of *Margaretta* did not survive to the other defendants in the case; and besides her representatives, if they are in fact not these defendants, are not now here complaining of this decree.

The petitioner does not pretend to have discovered any testimony which she could not have had brought into the case and used at the hearing; nor does she, in any way, specify what the nature of that testimony is which she says would have an important bearing on the merits of the plaintiff's claim. Such general and indefinite allegations cannot afford a sufficient ground for a rehearing. Although she was an infant, and had answered only by her guardian *ad litem*; yet she had attained her full age nearly three months before the decree was passed; and even now she does not impute to her guardian or solicitor any mismanagement, or neglect of her interests. Under such circumstances, and without showing any special grounds, this application must be considered as coming too late. (*e*)

Formerly on a creditor's bill to obtain the sale of lands charged with the payment of debts, the decree was never absolute, but *nisi causa* as against the infant heir, allowing him six months to shew cause after he attained his full age; when he was permitted to come in as a matter of course, and file a better answer, and have the case reheard upon the merits as thus newly presented; or the parol was ordered to demur as to the real estate descended

during the minority of the heir. If, however, the heir neglected to come in, within a reasonable time after he attained full age, and shew cause against the decree *nisi*, he was precluded, and it would be held to be absolute. (*f*) But according to our act of Assembly, the parol cannot be ordered to demur, in a creditor's suit, during the minority of an infant heir or devisee; nor can such an infant have a day allowed him to shew cause on his attaining his full age. In all cases coming under that act of Assembly, as this does, if the creditor establishes his claim, he is entitled to an absolute decree at once for a sale of his deceased debtor's real estate, for the payment of his debts; (*g*) and therefore, although an infant, on his attaining full age, pending the suit, may be allowed to come in as of course, and to demur, plead, or answer, as he may think proper; (*h*) yet he cannot be permitted to do so, after a decree of this kind has been passed, without virtually abrogating the act of Assembly, which by placing infants upon a footing with adults, in this particular, does, in effect, require of them as well as of adults, that they should shew good cause in order to have any such decree rescinded, and the case reheard. In this case no such good cause has been shewn, and therefore,

It is *Ordered*, that the said petition be dismissed with costs; and that the order suspending the execution of the decree, be rescinded.

The defendants appealed, and for the manner in which the case was disposed of by the Court of Appeals, see *Wyse v. Smith*, 4 *H. and G.* 295.

(*f*) *Fountain v. Caine*, 1 P. Will. 504; *Napier v. Effingham*, 2 P. Will. 401; *Bennet v. Lee*, 2 Atk. 531; *Brookfield v. Bradley*, 4 Cond. Cha. Rep. 297; *Kelsall v. Kelsall*, 8 Cond. Cha. Rep. 58.—(*g*) 1785, ch. 72, s. 5; *Hammond v. Hammond*, 2 Bland, 352; *Kelsall v. Kelsall*, 8 Cond. Cha. Rep. 61; *Powys v. Mansfield*, 9 Cond. Cha. Rep. 445.—(*h*) *Harwood v. Rawlings*, 4 H. & J. 126; *Savage v. Carroll*, 1 Ball. & Be. 548.

BOSLEY v. THE SUSQUEHANNA CANAL.

An injunction may be granted on an *ex parte* application on the bill alone, notwithstanding an apparent misnomer of the defendant corporation. An injunction granted before answer does not order the defendant to do, or to undo any thing. Where a canal and its towing paths are directed to be kept in repair for the use of the public, they must be considered as highways; and the acts of Assembly in relation thereto as public laws of which the court must take notice. A fee simple as encumbered with a right of way. Nothing can be deemed a breach of an injunction forbidding the disturbance of a peculiar right of way which does not interfere with its free exercise.

THIS bill was filed on the 21st of April, 1829, by *James Bosley* against *The proprietors of the Susquehanna Canal*. It states, that the defendants by a deed bearing date on the 18th of October, 1813, conveyed to *Edward Wilson*, three mill-site lots on the east side of the river Susquehanna, and on the west side of the *Susquehanna Canal*, at the tide-water locks, and delineated on a plan made for the defendants as lots No. 5, 6 and 7, with three other lots of land on the east side of the Canal, directly opposite to those above mentioned, and distinguished on the said plan as No. 20, 21 and 22; and also the right of taking water from the Canal sufficient for the working of six pair of mill-stones of six feet in diameter each. In which deed from the defendants to *Wilson*, is a covenant in the following words: 'And it is mutually agreed and understood by and between the parties to these presents, in manner following, that is to say, that the towing path of twenty feet on the west side of the Canal, and that of forty feet on the east side thereof are, and shall at all times be considered public highways, and shall not at any time be shut up or unnecessarily obstructed.' That *Wilson*, by an indenture bearing date on the 6th of July, 1826, conveyed the said six lots of land to *John Paul*; who conveyed them to this plaintiff. That the plaintiff had, at a heavy expense, improved the said lots; there being erected upon some of them a very extensive merchant mill, and other buildings; the peculiar location of which property was such, that the towing paths of the Canal, which it had been stipulated as aforesaid, in the deed from the defendants to *Wilson*, should be used as highways, constituted the plaintiff's most direct, convenient, and in fact only mode of access to his mill and other property. The bill further states, that the defendants by their petition to the General Assembly, caused a law to be passed, in which, among other things, it was declared, that if any person should break down or

intentionally injure any obstruction placed across the towing path of said Canal, for the purpose of protecting its banks from being cut up and destroyed by wheeled vehicles, such person should be liable to a fine of \$40; (1828, ch. 59, s. 5)—which law so immediately and intimately affected the rights of the plaintiff, having been passed without his knowledge, he, by his petition represented to the General Assembly all the facts and circumstances in relation thereto; whereupon, they passed an act by which the said legislative enactment was repealed, (1828, ch. 138.) That the defendants had, on the 7th of April, 1829, erected a rough frame house, about eighteen by twenty-one feet, immediately upon the towing path on the western side of the Canal, which house was clandestinely prepared, erected, and made habitable in less than twenty-four hours, and guarded on the first night after it was so located, and taken possession of by a tenant the following morning. By which means the plaintiff's access to his mill-site was much impeded, and the towing path, so essential to the prosperity of his mill, was totally obstructed.

Whereupon the bill prayed for a writ of injunction to be directed to *The governor and directors of the Susquehanna Canal* and their agents, &c. commanding *The governor and directors of the Susquehanna Canal*, immediately to remove, or cause to be removed the said frame house, and all other obstructions upon the towing path of said Canal; and enjoining upon them and their agents to allow a free and uninterrupted passage along the towing paths of said Canal, to the plaintiff, his agents, &c. until the further order of the court. And that a writ of *subpœna* be directed to *The governor and directors of the Susquehanna Canal*, and their agents, commanding them to appear, &c.

21st April, 1829.—BLAND, *Chancellor*.—This bill has been submitted as usual *ex parte*, without argument or remark. On turning to the act of Assembly by which these defendants have been incorporated, it appears that they have been made capable of suing and being sued only by the name of '*The Proprietors of the Susquehanna Canal*.' And it is declared that the said corporation or a majority of them shall elect out of their own members a governor and three directors, a treasurer and secretary for the year. (a) Hence, although it is most fair to presume, that the plaintiff intended to have made this body politic a defendant by its proper

(a) November, 1783, ch. 23, s. 2 and 3.

name; yet, it is evident, that strictly speaking he has not done so; because no process has been prayed against it, by that name alone by which it is made capable of being sued; and because it also appears, that instead of asking to have the writ of injunction directed to *The Proprietors of the Susquehanna Canal*, it is only prayed for against some of their agents, that is, their governor and directors, without having the corporation itself sued or called upon to answer, or restrained in any way whatever. This, however, is an objection of which this body politic may have no wish to take advantage; but considering it as an unimportant misnomer they may come in, waive it, answer by their true name, and take defence upon the merits. I shall therefore pass over this objection for the present, and leave it to be relied upon or waived by the defendants as they may think proper. (b)

From what has been set forth in the bill and its exhibits it appears, that this body politic, under their act of incorporation had acquired a fee simple estate in a certain parcel of land in Cecil county, lying along the left margin of the river Susquehanna; over which, by virtue of the same authority, they have formed a navigable canal. (c) As to which it is expressly declared, 'that the said Canal, when completed, shall be kept in good repair by the said corporation for the use of the public.' (d) These defendants, it appears then, are the owners in fee simple of a parcel of land; which land, so far as it is dedicated to the use of the public, has been subjected to the servitude of a highway; the tolls, for the privilege of passing along which, alone belong to the corporation; and consequently, this Canal, with its appurtenances and necessary towing paths, must be considered and treated in like manner as all other highways. Because all navigable rivers and great roads or canals, common to all passengers, and which are to be kept in repair for the use of the public, are in law deemed highways. And the acts of Assembly, by authority of which they are laid out, formed, and kept in repair, are public laws of which the court is bound to take notice. (e)

I have met with no instance, in the English books, and but one case among the records of this court, in which a defendant has been apparently ordered, by an injunction of this kind, to do, or

(b) *Binney's Case*, 2 Bland, 106.—(c) November, 1783, ch. 23, s. 6.—(d) November, 1783, ch. 23, s. 4.—(e) Com. Dig. tit. Chimin, (A. 1.) 1 Stark. Evid. 163, 400; *Agnew v. The Bank of Gettysburg*, 2 H. & G. 179.

to undo any thing. (f) The Court of Chancery by this writ merely prohibits certain acts, or any further acts from being done. And where acts have been done in violation of an injunction, it will order them to be undone or the matter restored; but I am not aware of any instance where it has, by an original writ of this kind, caused a nuisance to be abated or removed. (g)

Whereupon it is *Ordered*, that an injunction issue prohibiting the said company from erecting any new or other obstruction in the said towing path or highway in the bill mentioned; or in any manner to prevent him, the plaintiff, from using the same. And the said defendants may at any time, after the filing of their answer, move to dissolve the said injunction on giving ten days notice thereof to the said plaintiff. And the register is directed to endorse a copy of this order on the said writ of injunction.

On the 16th of July, 1829, the defendants put in their answer, which is certified as the answer of '*The Proprietors of the Susquehanna Canal*,' under the seal of that body politic; in which they admit the deed from them to *Wilson*, as stated in the bill; but put the plaintiff to the proof of his title in other respects; and they admit that a frame house was erected on the place mentioned; but aver, that ample space between it and the Canal has been left for a towing path, &c. And deny, that the plaintiff, or any other person had a right to use the said towing path as a wagon or cart way to the said mill, &c.

On the 22d of August, 1829, the plaintiff, with leave, filed an amended bill, upon which an injunction was granted upon the same terms as on the original bill. After which the defendants answered as before.

The plaintiff, by his petition filed on the 11th of October, 1830, so far as it is sustained by the affidavits exhibited with it, complains that the defendants and two of their agents had committed a breach of the injunction, by cutting away the bank or towing path of the Canal in two places, so as to prevent the use of it; and were about to erect locks of stone walls and wood in the places where the banks were removed. Upon which an attachment was prayed and granted.

The respondents against whom the attachments were awarded, by their answer, admit the fact of their having made two cuts

(f) *Norwood v. Norwood*, 2 Bland, 471, note.—(g) *Murdock's Case*, 2 Bland, 470.

across the towing path of the Canal, but deny that the use of it has ever been at all obstructed even while they were making those cuts; and state, that they have erected locks and built good bridges over them, which are safely and readily passable for men and horses, though not for carriages, which could not before pass along that portion of the towing path, across which the cuts have been made; they state that those cuts by giving access from the Canal into a large pond, to vessels and rafts, afforded them additional facilities and security in navigating the Canal; and thus materially improved the utility of that highway; and therefore they aver, that they were well justified in doing what they have done.

29th November, 1830.—BLAND, *Chancellor*.—The matter of the attachment for a breach of the injunction standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

The only question is, whether the defendants have, by these their admitted acts, deprived the plaintiff, in any degree, of that usufruct which it was the purpose of the injunction to preserve to him. A right of way, whether public or private, is essentially different from a fee simple right to the land itself over which the way passes. A right of way is nothing more than a special and limited right of use; and every other right or benefit derivable from the land, not essentially injurious to, or incompatible with the peculiar use called the right of way, belongs as absolutely and entirely to the holder of the fee simple as if no such right of way existed. He is, in fact, for every purpose considered as the absolute owner of the land, subject only to an easement or servitude; he may recover the land so charged by ejectment; he may bring an action of trespass against any one who does any injury to it, not properly incident to an exercise of the right of way; he has a right to the trees growing upon it; to all minerals under its surface; he may carry water in pipes under it; and the freehold with all its profits, not inconsistent with the right of way, belong to him. (*h*)

Here the plaintiff himself has shewn, that these defendants are the owners of the freehold and its profits subject to the servitude of this Canal or highway; and also, that they are entitled to the profits of that Canal or highway so passing through their land; and over which land, as he avers, they have granted a right of way to him. But the right of way as claimed by the plaintiff is

(*h*) Com. Dig. tit. Chimin, (A. 1.)

that of a public road or wagon way along the western margin of the Canal to his mill; whereas, the right of way over that ground, as admitted and contended for by the defendants, is confined to that of a towing path for the more beneficial or proper use of the Canal, and nothing more.

How far these several rights may be deemed reconcilable or incompatible with each other, it will be time enough to determine at the final hearing. (i) But in this stage of the proceedings, and with reference to these attachments, I deem it sufficient to observe, that where there are, as in this instance, several distinct, but intimately associated rights, such as a right of soil, alleged to be subject to two several kinds of right of way, which, from the nature of things, must, in some modes of exercising them, be brought into apparent collision with each other; (j) and an injunction has been granted for the preservation of one of them, the court will not consider any act to be a violation of such injunction, that is a fair exercise of another of the associated rights, and which leaves the right, under the protection of the injunction, as large a scope, and as free a range as it might have had when the injunction was served and before the act complained of was done. The validity and extent of the right, which, by the injunction, has been temporarily taken under the special care of the court; and of the other rights with which it stands connected, are matters which can only be determined with propriety at the final hearing; until then, or so long as the injunction is continued, they must be kept, as far as practicable, within their respective modes and lines of use, so as not to be allowed, in any manner to thwart, overlay, or obstruct that claimed by the plaintiff.

In this case it could not be said, that the cuttings complained of were not legitimate exercises of the rights of this body politic as holders of the fee simple estate in the land, and as owners of the profits of this highway or canal which they are bound to repair and keep in a proper state for navigation; unless it were shewn, that the plaintiff's right of way, in that condition in which it was found by the injunction, had been thereby in some form or other diminished or substantially impaired. And that, I am of opinion, has neither been admitted by the answers to the petition, on which the attachments were awarded, nor shewn by the affidavits which have been introduced and read by consent.

(i) *Chichester v. Lethbridge*, Willis' Rep. 72.—(j) *Ball v. Herbert*, 3 T. R. 253.

Whereupon it is *Ordered*, that the said defendants, *The Proprietors of the Susquehanna Canal*, and their agents, the said *John W. Thomas* and *James Galloway*, be, and they are hereby discharged from the said attachments with their costs to be taxed by the register.

PATTERSON v. M'CAUSLAND.

The law respects the regular course of nature as well in regard to the revolutions of the seasons, as in relation to animals and vegetables. A man may have an estate of inheritance in land so long as such a tree shall grow. The oak is said to live more than a thousand years; but the average term of the life of most forest trees seems to be indefinite; although it is evident, that all of them are subject to the law of mortality. The difference between exogenous and endogenous plants. The concentric layers of wood in the trunk of an exogenous tree, being, as it has been said, an annual production, shews its age, and the progress of its growth. Assuming that the concentric layers in the trunk of a tree do thus indicate its age; and then assuming, that trees, in general, do enlarge by a succession of annual concentric layers of a certain thickness, the ages of other trees similarly situated may be thus ascertained. But there being no proof, that the number of concentric layers in the trunk of a tree do correspond with the years of its age, as otherwise authenticated, the hypothesis, that the formation of each one of such concentric layers is evidence of the lapse of a year, cannot be judicially received as evidence for any purpose.

THIS case arose on cross caveats in the Land Office. *Joseph W. Patterson* and *Evan T. Ellicott*, who are admitted to have been the legal holders of the tract of land called *Litten's Fancy*, by virtue of a warrant of resurvey of that tract, claim the land in question under a certificate of resurvey, bearing date on the 6th of November, 1829, as a part of the tract called *Litten's Fancy Enlarged*. And they allege, that all the land taken in by their resurvey was, in truth, contiguous vacancy. *Robert M'Causland* claims the tract of land called *M'Causland's First Attempt*, under a certificate of survey, dated on the 12th of November, 1829, made by virtue of a common warrant; which land is altogether included within the survey called *Litten's Fancy Enlarged*.

Each of these parties caveated the certificate of the other; and under an order, obtained for that purpose, plots of the resurvey of those tracts of land, with others for illustration, were made; and the depositions of witnesses were taken, and the whole returned and filed. From which it appeared, that there was a considerable space between the original tract, called *Litten's Fancy*, and that called *M'Causland's First Attempt*; that the tract called *Long*

Fought and Dear Bought, which was laid out on the 21st of April, 1788, laid to the northward of them both, and extended entirely from the one to the other; and that the tract called *Jolly's First Attempt*, which was laid out in the year 1791, laid to the southward of them; and, in like manner, extended from the one to the other. The certificate of *Jolly's First Attempt*, calls for a black oak, at one point, a white oak at another, and a white oak at a third; which calls having been shewn and proved by witnesses, the lines of that tract were extended to those boundary trees accordingly, as the law required, whereby that tract has not only been made to border upon, but, to some extent, to interlock with the tract called *Long Fought and Dear Bought*, so as to leave not the least vacancy contiguous to *Litten's Fancy*, over which a resurvey could be extended from it, so as to embrace any part of *M'Causland's First Attempt*.

But *Patterson* and *Ellicott*, to impeach the testimony of the witnesses produced by *M'Causland* to prove the call for the marked black oak, the going to which brings those two elder tracts together, and closes the access to *M'Causland's First Attempt*, shew, that the black oak, of which the witnesses speak, is that which is designated as a marked black oak in the certificate of *Jolly's First Attempt*, bearing date in the year 1791; and that in a block, so cut out of that tree as to include the whole of the only chop mark upon it, there appears to have been added, by natural growth, only *twelve* concentric layers of wood outside of, and since the chop mark was made. They exhibited this block to the court as evidence; alleging, that, according to the regular and uniform course of nature, there is in all trees one such concentric layer of wood always formed every year. And, therefore, they contended, that the irresistible presumption was, that the black oak, shewn by those witnesses, upon the resurvey, could not have received the chop mark so long ago as the year 1791, when the tract called *Jolly's First Attempt* was laid out; and, consequently, could not be the marked black oak called for in the certificate of that tract; and that call being thus clearly disproved, the lines of that tract must, so far, be laid down by course and distance; and in that mode of locating it, there would be left a considerable space of vacancy along which the resurvey of *Litten's Fancy* might be extended, as it had been, so as to take in the whole of the tract called *M'Causland's First Attempt*.

3d December, 1830.—BLAND, Chancellor.—This case standing

ready for hearing, and the attorneys of the parties having been fully heard, the proceedings were read and considered.

The evidence here relied on to contradict and discredit the testimony of the witnesses who have been produced to prove the marking of this black oak as a boundary, is founded on a presumption, derived from what is alleged to be the regular course of nature in the growth of forest trees. I have met with no instance, in the books, in which proof of this kind had been received and respected in a court of justice.

A presumption is an inference as to the existence of a fact, not actually known, arising from its usual or necessary connection with others which are known. (a) The whole force of the presumptive evidence, here offered, rests, therefore, upon the fact of the alleged regular and invariable course of nature in the formation and growth of trees, being well known; or at least, on its being susceptible of, or having been clearly established by proof. For, if the course of vegetation, in this particular, be irregular, unknown, or on any account incapable of proof, then no inference can be deduced from it worthy of any consideration whatever as evidence. The point then to be here determined is, whether, in the growth of trees, a concentric layer of wood under the bark is a regular and invariable annual formation or not? This is a question involving an inquiry into the physiology of forest trees, which merits a most careful consideration.

The law respects the regular course of nature in every way; and, consequently, in all cases, in so far as the course of nature is known, all such facts, as well in regard to the revolution of the seasons, as to animals and vegetables; as the mating of birds, and their co-operation in rearing their young, the blooming time of roses, and the like, are received as being in themselves, entirely trustworthy; or as facts from which inferences as to the truth of other facts may be safely drawn. (b) In questions of bastardy, the time of access being proved, the known term of gestation, reckoning from the time of birth, is always received as a most satisfactory kind of presumptive evidence. (c) So too, in all the various questions in relation to the right of property, connected with a continuance of life, facts, so far as they are known, in regard to the

(a) 1 Stark. Evid. 23.—(b) Co. Litt. 40, 92, 197; 1 Stark. Evid. 472, note; 4 Stark. Evid. 1244; The case of Swans, 7 Co. 89.—(c) Co. Litt. 123, b. note; The King v. Luffe, 8 East. 193.

probability, the expectation, and the average duration of human life, have always been, in like manner, admitted as evidence; or, as a ground from which presumptive evidence of the existence of other facts may be fairly deduced. (*d*) And there can be no doubt, that the regular and known course of nature in the formation of vegetables may be as safely relied on as direct, or as presumptive evidence, as in that of animals. The only point of difficulty, as to both, being the establishment of the truth of that which is alleged to be the uniform and regular course of nature.

Little seems to be known as to the duration of the lives of trees of any kind; and yet, as a man may have an inheritance in fee simple, in lands as long as such tree shall grow; (*e*) it might become as important to ascertain the expectation of the life of such a tree, in order to set a present value upon such a base fee, as to ascertain the expectation of the life of a *cestui que vie*, for the purpose of putting a present value upon an estate for life. The olive tree, so highly valued for its fruit from the most remote ages to the present time, is said to be remarkable for its longevity. The ancients limited its existence to two hundred years, but modern authors assert, that, in climates suited to its constitution, it survives its fifth century. (*f*) But it is believed, that few of the common fruit trees of our country, apple, pear, or cherry, live to an hundred years of age.

By the common law of England, where the owner of a forest, in which others had a right of common for their cattle, felled the timber trees, he was allowed to inclose it so as to exclude such commonable cattle for three years thereafter, to prevent them from browsing and eating down the young spring before it had grown up beyond their reach; which term of inclosure was, by a statute passed in the year 1482, extended to seven years, for the more effectual preservation of the young growth; (*g*) which new growth, it has been held in England, will attain a sufficient size to be cut as timber fit for many uses at twenty years of age. (*h*) But the plantations which have been made in modern times, in England, so

(*d*) Doe v. Jesson, 6 East. 84; Doe v. Griffin, 15 East. 293; Doe v. Deakin, 6 Com. Law Rep. 476.—(*e*) Richard Lifford's case, 11 Co. 49; Ayres v. Falkland, 1 Ld. Raym. 326; Com. Dig. tit. Estates by grant, A. 6; 2 Blac. Com. 109.—(*f*) 2 Michaux Amer. Sylva, 57.—(*g*) 22 Ed. 4, c. 7; Sir Francis Barrington's case, 8 Co. 271; 6 Jac. Law Dic. 450 v. Wood.—(*h*) 35 Hen. 8, c. 17; 13 Eliz. c. 12, F. N. B. 59; 2 Inst. 642; Bac. Abr. tit. Tythes, C. 4; Richard Lifford's case, 11 Co. 47; 2 Mich. Am. Sylva, 144.

far as they have gone, afford perhaps the only, or certainly the least questionable evidence as to the growth and age of forest trees. In such cases it has been observed, that oaks and beech are not fit for use, as timber, until they attain about fifty or sixty years of age; but that the Scotch fir, (*pinus sylvestris*,) larch, (*larix*,) ash, and chesnut, become fit for use after a growth of twenty or thirty years. The larch, in particular, than which there is no tree in England of quicker growth, is said, on an average in favourable situations, to increase until fifty years of age, at the rate of half an inch in diameter and two feet and a half in height each year. Instances are mentioned where in Scotland, young oaks, valuable for their bark alone, are usually cut at from twelve to twenty-five years old. (i)

I do not understand, however, that any of these historical accounts of the plantations of forest trees have, as yet, covered as much as the lapse of an hundred years. They make no mention of the expectation of life that may be attributed to any such trees; nor do they speak of the average term of the existence of any of them. It has been said that in England the oak attains an age, in some instances, of more than a thousand years; but that the beech, the ash, and the sycamore, (*acer pseudo platanus*,) most likely never live half so long. But all plants, as well as all animals, are alike subject to the inexorable law of mortality, as is sufficiently shewn by the bountiful provision made by nature for their reproduction. Hence, and from the well known fact, that all plants are subject to diseases, it necessarily follows, that all trees, like animals, have an average and ultimate term of existence beyond which their lives are rarely extended, or cannot be prolonged. (j)

(i) Rees' Cyclo. v. Plantation.—(j) Rees' Cyclo. v. Timber; Thompson's Chem. b. 4, c. 2, s. 13, and c. 3, s. 6; Roget's Animal and Vegetable Physiology, part 4.

LOUDON, in his *Arboretum Britannicum*, states that the oldest oak in England is supposed to be the parliament oak, so called from the tradition of Edward I, holding a parliament under its branches in Clifton Park, belonging to the Duke of Portland, this park being the most ancient in the island. It was a park before the conquest, and seized as such by the conqueror. The tree is supposed to be fifteen hundred years old. The tallest oak in England was the property of the same nobleman; it was called *the duke's walking-stick*, higher than Westminster Abbey, and stood till of late years. The largest oak in England is the Calthorpe oak, Yorkshire, measuring seventy-eight feet in circumference where the trunk meets the ground. The *three shire oak*, at Worksop, was so called from covering parts of Yorkshire, Nottingham, and Derby; it had the greatest expanse of any recorded in this island, dropping over seven hundred and seventy-seven square yards. The most productive oak that of Gelond's, in Monmouthshire, felled in 1810. Its bark brought £200. And its timber £670, (about \$4,000)

The existence of many forests over the same tracts of country, by which they are now occupied in Europe, have been known to stand as they now do for many centuries past; but whether their continuance has been kept up by the prolonged life of the greater proportion of the trees of which they are composed; or altogether, like nations of human creatures, by a succession of generations, leaving no individuals now alive of all those of which they were formerly composed, there seems to be no means of ascertaining. Most of the forests of our own country are, from all appearances, of as long standing as any others on the face of the globe; and there are doubtless many lofty trees now growing which had given umbrage to *Powhatan*, that distinguished chief of many tribes. But beyond the time of the first settlement of our own country by Europeans, all our knowledge in relation to it can only be derived from inference and conjecture.

On considering the slow growth of most forest trees; and on observing in all ancient forests how few appearances there are of any changes or renewals, there is much reason to believe, that the most durable of forest trees have an almost indefinite length of life. (*k*) The white mulberry was introduced into Virginia about the year 1623, for the purpose of rearing silk worms; (*l*) and some of the same species of mulberry trees, which had been set out in Georgia, for a similar purpose, were, in 1802, alive at an hundred years of age. (*m*) The Norway spruce fir, (*abies picea*,) is allowed to be one of the tallest trees of the old continent. The finest stocks of it are straight bodied, from one hundred and twenty to one hundred and fifty feet in height; and from three to five feet in diameter; and are said to be a hundred years in acquiring that size. (*n*) The common elm, (*ulmus campestris*,) is reckoned one of the finest trees of the temperate zone of Europe. Several stocks of it, which had been planted in France about the year 1580, survived in 1819; that is, were about two hundred and forty years of age; and had then attained twenty-five or thirty feet of circumference, and eighty or ninety feet of height. (*o*) In France, at Sancerre, in the department of the Cher, one hundred and twenty miles from Paris, there was, in 1819, in existence a chesnut tree, (*castanea vesca*,) which, at six feet from the ground, was thirty feet in circumference. Six

(*k*) Roget Anim. and Veget. Physi. pt. 4, c. 3, note.—(*l*) 1 Virg. Stat. 126, 420, 520; 2 Burke's His. Virg. 142.—(*m*) 2 Mich. Am. Sylva, 185.—(*n*) 2 Mich. Am. Sylva, 304.—(*o*) 2 Mich. Am. Sylva, 225.

hundred years ago it was called the *great chesnut*; and though it is supposed to be more than a thousand years old, its trunk was still perfectly sound, and its branches were annually laden with fruit. (*p*)

All forest trees have a range of climate within which they flourish best, and far beyond which they will not grow, or cannot be propagated; and even within the range of their appropriate climate, they are all more or less affected by the soil and situation in which they happen to be rooted. As the great Parent, nature, rolls round the seasons of the changeful year, all of them assume different external appearances in succession. That they do not put forth their foliage or bloom in winter is obvious; but how they are, in other respects and internally, affected by the revolutions of the seasons, seems to be a mystery. Yet an opinion has become very prevalent, that the structure of their wood, visible on dissection, affords evidence of the periodical progress of nature in effecting their enlargement.

‘Wood in vegetable anatomy, is that more or less hard and compact substance, which makes up the bulk of the trunk and branches of a tree or shrub, and is concealed from view by the bark. When cut transversely, the wood is found to consist of numerous concentric layers, very distinct in the fir, and in trees of cold or temperate countries in general; less so in those appropriated to a tropical climate. The external part of each circular layer being much the most hard and compact, often with somewhat of a horny appearance, distinguishes the limits of each. Scarcely any two layers of the same tree are precisely alike, in the proportion which this compact part bears to the rest; nor does any one layer exhibit a precise uniformity of diameter in its whole circle.’ (*q*) And it is also said, that ‘the bark of trees annually changes into lifeless wood; whence the concentric rings, which are seen in the trunk of trees, when they are felled, are annually produced; and are said generally to be thicker on that side of the trunk, which grows towards the south, than on the northern side; and thicker in the summers most favourable to vegetation than the contrary. These rings, as they lose their vegetable life, and at the same time a part of their moisture by evaporation or absorption, gradually become harder and of a darker colour; insomuch, that by counting their number, it is said that not only the age of the tree, but that the mildness or moisture

(*p*) 2 Mich. Am. Sylva, 142.—(*q*) Rees' Cyclo. v. Wood in Vegetable Anatomy.

of each summer during the time of its growth, may be estimated by the respective thickness of the 'rings of timber.' (r)

The Linnæan hypothesis was, that the pith added a layer every year to the wood internally. But on its being observed, that many trees grew vigorously, the pith or a part of which had rotted so as to leave them almost entirely hollow, that hypothesis was abandoned as totally erroneous. And on its being discovered, that the food of a tree, after having been taken in by the root, and, somehow, carried up and digested into sap by the leaves, was assimilated and added to the bulk of its trunk and limbs in layers immediately under its bark, the opposite hypothesis was adopted, that trees were increased in size by those external additions alone.

Hence it was, perhaps, that upon a more careful examination of the organs of vegetables, they were classed, in reference to the visible arrangement of those organs, into two great groups, the first called *exogenous*, because of their having the vascular tissue arranged in concentric cylinders around a common axis, the pith; and the second, *endogenous*, having this tissue disposed in bundles, and not in cylinders. In the first class, the tubes and woody fibre are arranged in concentric bands, having the cellular tissue, in part, packed in between them; and in part forming lines, called the medullary rays, cutting them at right angles, and radiating from the axis of the stem. Such stems increase by the regular addition of new layers on the outside of the old wood; and are thence termed *exogenous stems*, or *growers outwardly*, as the name imports. This is the structure of almost all the forest trees of our Union. In the second class, the tubes and woody fibre are disposed in bundles throughout the stem; the interstices being filled up with cellular tissue. The stems having this structure do not increase in diameter, after they are once fairly formed, but only in solidity. This they do by the addition of new bundles of tubes and woody fibre internally. Hence, they have received the name of *endogenous or growers inwardly*. (s) Again it was observed,

(r) Darwin's *Phytologia*, 476.

(s) 'The wood, which exists more or less abundantly, even in herbaceous stems, and which forms so large a portion of those of trees and shrubs, in the stem which we have selected for examination, consists of a single zone or layer, composed of tubes and woody fibre, disposed without any regular order, except that the latter is the most abundant on the outside, next the bark. The second year of a plant's growth, a new layer is formed outside of the first, and similar to it in every respect. The third year this process is repeated; and thus the stem increases in size, a new

on the first appearance above ground of the nascent plant, that it in many cases exhibited a pair of thick fleshy lobes of the seed, hav-

layer being formed annually, as long as the plant lives. The wood of an exogen, of one year's growth, may be viewed as an elongated hollow cone, extending from the base to the summit of the stem, and enclosing the pith. This cone does not extend further, nor does it enlarge in any way; but is surrounded the next year by another cone, which, like the first, after being formed, undergoes no change in dimensions. Hence, as the necessary result of this mode of growth, the stem of an exogen is more or less conical.'

'Each layer, or to speak more accurately, each hollow cone of wood, is the result of a single year's growth; it is evident, that the age of an exogen may be ascertained by counting the number of rings presented on a transverse section of the stem, made near its base. This may be done with great accuracy, in most trees of the temperate and cold climates, in which, in consequence of the periodical suspension of vegetation, the annual layers are distinctly marked; but in the case of trees of the torrid zone, where vegetation goes on throughout the year, this cannot be so readily done. In old trees, the rate of increase being very uniform, their age may be determined with considerable accuracy, by the inspection of a mere fragment of the stem, the diameter of the whole stem from which it was taken being known. A rough estimate of the age of a tree, is sometimes made by dividing the semi-diameter of its base by the average increase of the species to which it belongs, that average being determined by previous observation. In these several ways, the ages of numerous very old trees have been determined. It should be remarked, however, that these determinations, except where they are based upon an actual counting of the rings presented by a transverse section of the trunk, cannot be regarded as any thing more than approximations to true age. A tree growing in peculiarly fertile ground, will enlarge much more rapidly than most other trees of the same species; and of course, with a given diameter, will have a less number of zones than the average. In the case of a tree growing in peculiarly barren ground, just the opposite effect would ensue. An estimate of the age of the first, made by dividing its semi-diameter by the average thickness of the zones of that particular species, would give too great an age. An estimate of the age of the last, made by this same method, would give an age less than the true one.'

'There is almost always a marked difference in colour and density, between old and recent wood. The outer and more recent portions of the stem, have been called, in allusion to their colour, *alburnum*; and in allusion to their office, sap wood; the inner and older portions are termed the heart wood. After a few years, the colour of a layer of wood is changed, its density is increased, and it takes thereafter little part in the transmission of the sap. During the winter, it is true, it generally contains sap, but then this sap is rather deposited in it, than circulating through it. The change in colour and density, by which sap wood is converted into heart wood, is caused by the deposition of a solid matter, peculiar to each species, in the tissues of that part. This matter is, in most cases, soluble in nitric acid, and hence it is, that if a piece of heart wood be immersed in that acid, the colour is discharged, and the piece again assumes the appearance of sap wood. Where the matter deposited is of a resinous character as in the pines, it adds very much to the durability, and consequently, to the value of the heart wood. On this account, as well as on account of its greater solidity and strength, the heart wood is universally preferred to the sap wood, for use in the arts. As the layers of wood, in the course of a few years after their formation, cease to take any active part in the circulation of the sap, and, in time, become to all intents and purposes dead matter, it would naturally

ing some resemblance to leaves; these were called *cotyledons*. The common garden bean, the peach, the oak, and a great variety

follow, that the central part of the stem would be first to decay. Where the matter deposited in those parts is not of such a character as to protect them from decay, this is frequently found to be the case. The resinous matter, deposited in the heart wood of the pine, is of such a nature as effectually to resist the disorganizing agencies which operate upon it; and hence it is that pines, even those of the greatest age, are never found hollow. But such is not the fact with respect to the matter deposited in the heart wood of the sycamore, (*platanus occidentalis*,) and hence, all the oldest trees of that kind, are little more than shells.'

'Endogenous stems differ very much from exogenous ones in their structure. The characteristic differences are the arrangement of the tissues, and the manner of their growth. Besides this, endogens differ from exogens, in having neither pith, medullary rays, bark, or wood, properly so called, but consisting of a confused mass of woody bundles, imbedded in cellular tissue. In the stalk of the corn, (*Zea mays*,) which affords a good specimen of a stem constructed on the endogenous plan, we find an external conical integument, without liber, and bundles of woody matter, so arranged throughout the cellular tissue, as to be much more numerous and compact at the circumference, than towards the centre. In the stem of the garden asparagus, (*asparagus officinalis*,) the woody bundles are distributed uniformly, throughout the stem, and so soft as scarcely to be recognized as woody matter. The same arrangement of the woody bundles, exists in the green brier, (*smilax rotundifolia*,) the only endogenous shrub common in Virginia. In the stems of grasses, which have been said to be the least endogenous of all endogenous stems, the structure is so modified as not to be at once evident. The peculiarity of these stems is, that they are hollow, except at the nodes, or joints, which are very compact discs, closing the stem entirely. They are, however, in every instance, at first solid, and become hollow in the course of their growth. In other respects, the stems of grass present no variation from the typical structure of endogens.'

'The life of endogens, as well as their diameter, is limited by the nature of their rind. When the lateral growth of the stem has proceeded to a certain extent, the rind hardens, and the stem being, in this way, prevented from increasing in diameter, can only grow in length; and as the consequence, stems of this character are generally slender. The continual deposition of new matter, within the unyielding rind, finally produces a total solidification of the stem, and death follows as a necessary consequence. Thus the life of an endogenous stem is limited; for, unless destroyed by some external agency, it must die of old age. The individual, however, is seldom destroyed; for, whilst the trunk is thus slowly perishing, the great accumulation of sap in the roots, causes the development of new shoots from the base of the stem, and these continue the life of the individual when the original trunk dies down to the ground. In this view, the life of endogenous trees is unlimited.'

'In the structure of exogenous stems, on the other hand, there is nothing to limit either their increase or duration; they never die purely of old age, but when destroyed, are destroyed by some external agency. The central wood of exogens, it is true, dies in the course of time, but the death of the stem does not follow as a consequence of this; for nothing is more common than to see a tree hollow, destroyed at its centre, whilst it is growing vigorously at its circumference. The sycamore, (*platanus occidentalis*,) furnishes a remarkable and well known illustration of this. The oldest trunks are generally all destroyed, excepting a few of the outer and recently formed layers, which prolong the existence of the individual.'—*An Essay*

of other plants are alike in this respect; and have thence been denominated dicotyledonous plants. Another class, on their first appearance exhibit only one such leaf or cotyledon, such as Indian corn, the cabbage tree, (*chamaerops palmeto*,) &c.; and hence they have been called monocotyledonous plants. Those of the first kind having been found to have stems of the exogenous structure, and those of the latter to be always of an endogenous formation, the two classes have been and may as well be designated by the one name as the other. (*t*)

Then assuming that this was the only mode by which exogenous trees were enlarged, and because the sap flowed more freely and obviously in summer than in winter, it was affirmed, that the number of those concentric layers, counting from the surface to the centre, demonstrated the number of years the tree had been growing. But as has been seen, it is admitted, that in the wood of forest trees of the temperate zone, in which those concentric layers have been noticed, it has been observed, that each layer is composed of a great number of thinner and scarcely distinguishable ones, which in some cases assume a more or less conspicuous appearance than usual, in consequence of the fluctuations of the seasons, or accidental checks on the growth of the tree; as hard winters render the outside, or porous part of each circle, more decided; while favourable summers make the circle itself altogether broader.

Hence it is evident, from what is thus stated by the advocates of this notion, of each layer's being an evidence of a year's growth, that it is founded upon the apparent effects of the revolution of the seasons in the temperate zone. But the roots of carrots, beets, &c., which are the growth of a single season; and indeed the roots of all perennial trees, as well those of the endogenous as of the exogenous class, are also formed of concentric layers; (*u*) and the wood of the trunks of most of the forest trees of the torrid zone are evidently formed in the same way; although some of them may exhibit slighter traces of such concentric rings than others. But the wood of none of the endogenous class of plants, among which is the cabbage tree, (*chamaerops palmeto*,) of

on *Vegetable Physiology*, by George D. Armstrong, Prof. of Nat. Philosophy and Chemistry, in Washington College, Virginia, chap. 5 and 6; *The Farmers' Register*, by Edmund Ruffin, vol. 7, No. 3.

(*t*) Eaton's *Botanical Grammar*, 18.—(*u*) Roget *Anim. and Veget. Physi.* pt. 1, c. 1, s. 3.

our country, exhibit any such indications of the formation of successive concentrical layers, as are to be found in a stem of the oak, pine, &c. (*w.*)

The conspicuous formation of successive layers of wood is, however, not only confined to trees of a particular class, but even among them the formation of such layers differs materially, according to their respective species, ages, and situation, when growing in their several appropriate climates. And yet a tree of one species engrafted upon the stock of another of the same species, will grow vigorously, producing fruit of a different kind, and wood of a very dissimilar appearance from that on which it grows. It is remarkable, that the branches of the resinous trees consist almost wholly of *wood*, of which the organization is even more perfect than in the body of the tree; the reverse is observed in trees with deciduous leaves. (*x*) There are six times more concentrical circles in a given space of the yellow pine, (*pinus mitis*,) than there are in the pitch pine, (*pinus regida*,) or loblolly pine, (*pinus tæda*.) (*y*) The wood of the black oak, (*quercus tinctoria*,) is coarse grained with empty pores; (*z*) that of the red oak, (*quercus rubra*,) is also coarse grained, with pores large enough for the passage of a hair. (*a*) The wood of the sweet gum, (*liquidamber styraciflua*,) when sawn into boards, is observed to be transversely marked at considerable distances, with blackish belts; (*b*) that of the black gum, (*nyssa sylvatica*,) and its genus, has its fibres interwoven and collected in bundles. It is difficult to split the wood, which in the arrangement of its tubes and woody fibres strikingly resembles that of a tree of the endogenous class. (*c*) The internal structure of the sugar maple, (*acer saccharinum*,) seems to undergo several changes in the course of its life. As the growing tree rises to maturity the grain of its wood becomes more undulated or curled; and, at an advanced age, by an inflexion of its fibres, from the circumference toward the centre, there are produced a kind of spots, which, when the wood is polished, resemble bird's eyes. (*d*) So, too, as age advances, the wood of the oak likewise undergoes some sensible changes; for, it has been said by a person in Eng-

(*w*) Rees' Cyclo. v. Monocotyledon, Palmae, and Wood; Roget Anim. and Veget. Physi. pt. 1, c. 1, s. 2.—(*x*) 2 Mich. Am. Sylva, 274.—(*y*) 2 Mich. Am. Sylva, 254, 268.—(*z*) 1 Mich. Am. Sylva, 92.—(*a*) 1 Mich. Am. Sylva, 104.—(*b*) 1 Mich. Am. Sylva, 318.—(*c*) 2 Mich. Am. Sylva, 166.—(*d*) 1 Mich. Am. Sylva, 227.

land, that of a multitude of oaks he had felled there, he counted the concentrical rings of one of about thirty-four inches in diameter, which was sound at the butt, as nearly as he could ascertain them, to the number of two hundred; but those of the last fifty years growth, next the bark, were so thin, he could not count them with certainty; though, as he thought, with sufficient accuracy to ground a calculation upon as to the proper age for felling timber; ranging as to oaks from one to two hundred years of age; and as to elms from fifty to a hundred years of age. (*e*)

There is, according to the law of England, not only a custom as to what may properly be regarded as timber; (*f*) but also a custom as to what is called a husbandlike manner as well in regard to the best *season* as to the proper *growth* at which trees should be cut. And to prevent the violation of such customs an injunction may be obtained. (*g*) Yet there does not appear to have been any clear well settled rules laid down as to what is to be deemed the proper age, size and season for cutting timber of any description. What, in some of the old books, is called *Sylva Caedua*, coppice, or under growth, was not considered as fit to be cut sooner than at twenty years growth. But latterly the common forest growth seems to have been regarded as timber, not according to its age, but by its size and utility. It would seem to have been held, in England, that the proper season for cutting timber was when the sap was down; that is, in the winter season after the trees had been divested of their foliage. (*h*) In this country, it is believed, there are no legal rules in relation to this matter. But it has been said, that after the forest trees have parted with their leaves in autumn, that their organs still continue their functions, though more slowly, during the whole winter; and in so doing accumulate a considerable quantity of matter in the vascular tissue of the stem; which matter, except the resin of the pine, being often of a nature rather to accelerate than prevent decay, is believed to be liquified and carried up in the spring, and then by the newly formed leaves digested, and sent down again for the nourishment and enlarge-

(*e*) Rees' Cyclo. v. Timber.—(*f*) Co. Litt. 53; Chandos v. Talbot, 2 P. Will. 606.—(*g*) Aston v. Aston, 1 Ves. 264; Chamberlyne v. Dummer, 1 Bro. C. C. 166, S. C.; 3 Bro. C. C. 549, S. C.; 2 Dick. 600; Oxenden v. Compton, 2 Ves. jun., 70, 73; Hampton v. Hodges, 8 Ves. 105; *Ex parte* Phillips, 19 Ves. 119; Gower v. Eyer, Coop. Rep. 156; Bridges v. Stephens, 2 Swan, 159, note; Smythe v. Smythe, 2 Swan, 251.—(*h*) 2 Inst. 642; F. N. B. 59; Chamberlyne v. Dummer, 3 Bro. C. C. 549; Bac. Abr. tit. Waste, C. 2.

ment of the tree. Whence, and from actual observation, it has been confidently asserted, that the best season to cut timber, as well as to prune fruit trees, to prevent the dry rot in the timber, or in that part of the living tree from which the amputated limb has been taken, is during the summer when the trees are in full foliage, and their sap is in pure and active circulation. (*i*)

But all trees, although standing within the general range of their appropriate climate, are very materially affected by the peculiar soil and situation in which they may happen to be rooted. (*j*) Even the great white pine, (*pinus strobus*,) the lofty chief of our forests, which in some instances elevates its top to the height of a hundred and eighty feet from the ground; (*k*) and the beautiful flowering poplar, (*liriodendron tulipefera*,) which may be ranked next to it in stature, and only after the oak in utility, exhibit, in the texture of their wood as well as in their size, the most unequivocal evidence of the generosity or unfriendliness of the soil in which they stand. (*l*) But such is the peculiar constitution of the white oak, (*quercus alba*,) which for general use is considered as the most valuable of all the timber trees of our Union, that it attains its largest size and greatest perfection in the cold and comparatively barren soil of those swampy plains, many of which extend in considerable tracts along the borders of the Chesapeake, and on the right and left shores of the lower Potomac; while on the otherwise fertile soils, west of the mountains, it is by no means so remarkable for its size. Whence it may be strongly inferred, that a tree, the texture and density of the wood of all the species being known to be alike, may in one situation attain a much larger size, and in a transverse section of its trunk exhibit a greater number of concentric circles than another of the same age the growth of a different situation.

If it be true that trees are enlarged chiefly or only by the formation of successive concentric layers, then it necessarily follows, that those layers, as the tree enlarges, must become wider as well as longer each year, so as to embrace the whole of its increased dimensions; and consequently the quantity of wood formed each year, supposing the several concentric layers to be of the same

(*i*) Essay on Vegetable Physiology, by Armstrong, Prof. &c. Washington College, Virg. chap. 7 and 19; 'The Farmers' Register, by Ruffin, 7 vol. No. 4 and 8.—(*j*) 2 Mich. Am. Sylva, 130, 226.—(*k*) 2 Mich. Am. Sylva, 293.—(*l*) 1 Mich. Am. Sylva, 302; 2 Mich. Am. Sylva, 295.

thickness, must increase annually in a compound ratio. But although such a rate of increase may well be supposed to be carried on during the early years of its growth, there is every reason to believe, as was observed of the diminished thickness of the last fifty outside rings of the before mentioned English oak, in the two hundred of them which were counted from its centre to its surface, that the concentrical layers become thinner and less distinguishable as the tree grows older; and in proportion as its roots find it difficult to draw an increased supply from the soil in which it stands. These concentrical layers, as they are successively laid on, not only prevent the previous ones from thickening, or enlarging in any way, except by rising upward, which it is said they do not do; but as it is thought the continually increasing pressure, produced by the laying on of new layers, becomes so great as in many instances to occasion decay and a hollowness of the tree. (*m*)

(*m*) Roget Anim. and Veget. Physi. pt. 1, c. 1, s. 3.

'That the upward growth of the stem takes place altogether in the green shoot of each year, whilst the older portions of the stem undergo no change in dimensions, is proved by the following fact, known, I presume to all. When a name is cut upon the bark of the beech tree, (*fagus sylvatica*,) the tree may continue to grow until it has doubled its original height, but the name will never be raised further from the ground than the point at which it was originally cut. This process is the same, both in exogens and endogens.'

'Concerning the growth of the fibro-vascular system, *i. e.* the vascular tissue and woody fibre, there has been a great diversity of opinion among botanists. By far the greater part of the observations which have been made for the purpose of examining into this matter, have been made on exogenous plants; to these, therefore, our attention must be principally directed. But yet it should be remarked, we can admit no explanation which does not apply to endogens, as well as to exogens. The origin of the fibro-vascular system is presumed to be the same in both cases; and so also its development, except in the single particular of its arrangement.'

'There are certain facts respecting the production of the wood, which have been established by careful and oft repeated experiments. To these we will first attend. The *first* of these is, that the wood, or at least the material of which the wood is formed, is elaborated in the upper part of the plant, and sent downward; and not in the root, and sent upward. This has been established by such experiments as the following; early in the spring a light ligature was tied around a young branch, and in this condition the branch was suffered to remain for the season. On examining it, towards autumn, the part above the ligature, was found to have increased in size, whilst that below had remained unaltered. A ring of bark was removed from a growing stem of a young tree, when the wound commenced healing, the new woody matter was formed on the upper lip of the wound, and not on the lower. *Second*, the new wood is produced, either from the bark, or between the bark, and the wood of the last year, and not by that wood. This was proved by Du Hamel, in the following manner: having carefully introduced plates of tin foil, between the bark and wood of a growing tree, he suffered it to remain undisturbed for several years. On cutting across the stem, at the end of this time, he found, that the new layers of wood had been deposited on the outside of the tin foil, without in the least

Supposing it to be true, that all our forest trees are sustained only by the circulation carried on immediately under their bark,

disturbing it. *Third*, the origin of the wood is in some way intimately connected with the action of the leaves. It has long been known, that the diameter of a stem depends very much upon the number of the leaves which it bears; and that the larger the number of leaves developed upon a stem, the greater will be its diameter, and the more rapid its growth. And also, that the largest quantity of wood is always found on that side of a stem which developes most leaves. But had we only these facts, on which to base a judgment, we might hesitate which to consider the cause and which the effect; whether to believe that the luxuriance of the stem arose from the increased number of the leaves, or the increased number of leaves from the luxuriance of the stem. This question, however, has been determined by direct experiment. Mr. Knight stripped off the leaves from the upper portion of a young shoot; as the consequence, the shoot died as far down as the leaves were removed, whilst below that point, it flourished. He afterwards insulated a single leaf, by removing a ring of bark, at some distance above the point at which it was inserted into the stem, and another at an equal distance below that point. In the course of the summer a perceptible increase in the wood took place above the leaf, but none below it. In another instance, he removed a narrow ring of bark from the lower part of a growing stem; the stem afterwards increased sensibly in diameter down to this ring; but not at all between the ring and the leaf next below it. From these and similar facts he has inferred, that the matter of which the wood is formed, is elaborated in the leaves and sent downwards. *Fourth*, the portion of wood formed each year, is entirely independent of, and distinct from, that of every other year; and when once formed, undergoes no change, except the slight change which takes place when it is converted from sapwood into heartwood. In confirmation of this, many curious facts may be mentioned. On what are called 'line trees,' in the west, certain marks are made when the land is first divided off into lots. This is done by striking with an axe, so as to cut through the bark and two or three of the outer layers of the wood. If one of those trees be examined, say twenty years after the marks were made, no traces of them will be discovered on the outside of the bark; nor, if we cut into the wood, will we find any on the nineteen outer layers; whilst we will find all the marks perfect in the twentieth layer, in which they were originally made; thus establishing the fact, that that layer has remained unaltered since its first formation, and that all the outer layers have been formed entirely independent of it. Good, in his *Book of Nature*, states, that in England, dates of very remote national eras, and the initials of monarchs who flourished in early times, have been found stamped in the very heart of the timber. M. Klein states, that in the year 1727, a long series of letters were discovered in the trunk of a full grown beech, near Dantzic. The letters were conspicuous in a layer about half way between the axis and the bark of the stem, whilst no traces of them could be discovered, either in the layers within, or on those without it. The same author mentions several other facts of the same kind. In one instance, the image of a thief hanging from a gibbet, was discovered in the timber of a beech tree, apparently drawn by nature's own pencil. In another tree, the figure of a crucified man was found in similar circumstances; and in another, a chalice, with a sword perpendicularly erect, sustaining a crown on its point. Such marks were formerly attributed to miraculous intervention, or regarded as miraculous sports of nature; and on this account, were preserved with peculiar care. When rightly understood, they place the truth of the above statement beyond a doubt.'—*Essay on Vegetable Physiology*, by Armstrong, Prof., &c., Washington, Virginia, chap. 7; *The Farmers' Register*, by Ruffin, vol. 7, No. 4.

as has been inferred from seeing many of them grow vigorously which were entirely hollow, then it would seem, that, on a total stop being put to that channel of circulation, death would ensue as certainly, and almost as suddenly as by cutting the arteries of an animal.

Yet it has been observed, that early in the spring, before any thing like a leaf has been put forth, the vine particularly, and some forest trees, the sugar maple, &c. on a transverse incision being made into their wood pour forth a quantity of sap, which is always seen to proceed from the wood, and not from any layer near the bark; which shews that the vascular tissue of the stem, by some supposed to be mere dead wood, contributes largely, if not altogether, to supplying the plant with that portion of its nutriment which it certainly does, and must in a very great degree derive from the earth. And it is not uncommon to see forest trees, which in the winter or summer had been belted by a chop made all round into the wood of the trunk, near the ground, put out their usual amount of foliage in the following spring and sustain themselves during the year; which proves that there is a flow of sap through the wood of the trunk which contributes largely to the support of the vitality of the plant. In corroboration of this, it has been also observed, that besides the ordinary longitudinal vessels, there is what is called the *silver grain*, or medullary rays, consisting of numerous thin plates radiating from the pith to the circumference, intersecting the concentric layers, and visible in almost all kinds of wood; in the oak every tube is touched by them at short distances, and slightly diverted from its course. These plates, it is supposed, perform some important functions in the circulation of the sap. (n)

(n) Ruffin on Calcarious Manures, chap. 12 and 13; Rees' Cyclo. v. Circulation of Sap and Silver Grain; Thompson's Chem. b. 4, c. 3, s. 3; Roget Anim. and Veget. Physi. pt. 1, c. 1, s. 3.

'To illustrate the theory, that vegetables extract their matter chiefly from the atmosphere, and are of course a powerful vehicle for fixing and bestowing atmospheric manure on the earth, the following fact is circumstantially related, on account of its complete application and to expose it to investigation. Some years ago, a locust tree at Colonel Larkin Smith's in the county of King and Queen, and state of Virginia, received an injury which made it necessary to cut away entirely the bark around its body for eight or ten inches, so that its bark above and below was wholly separated, without a cortical vein between. The wound was entirely covered with a close bandage of some other bark, which lapped beyond the edges of the wounded bark, above and below. And the tree was left to its fate. The plaster bark never grew to the tree, but the edges of the wounded bark, gradually approached each other under its shelter, and after several years met and united. By the time the wound was healed, the body of the tree above had become one-third larger than its

It has been often said, not only that the age of a tree may be ascertained by the number of its concentric layers; but that their closeness or distance from each other indicates the slowness, or the rapidity of their growth. The concentric layers of the wood of the live oak, (*quercus virens*,) are very close, and it is very hard and heavy. The concentric layers of the wood of the white cedar, (*thuya occidentalis*,) which grows near the falls of the Potomac, are also very close; as many as one hundred and seventeen have been found in a log of little more than thirteen inches in diameter; but the wood is very light, soft, and fine grained. Yet the closeness of the concentric layers of the wood in these two species of trees, differing so widely in all other respects, is said to shew the extreme slowness of their growth. (o) The rapid growth of the catalpa, and the loblolly pine, is said to be proved by the great width of their concentric layers. (p) But the wood of the locust, (*robinia pseudo acacia*,) is finer in its grain than any of the oaks, and much harder, when seasoned, than any of them, except the live oak. The locust converts its sap into perfect wood every third year; which is not done by oaks in less than every tenth or fifteenth year; and at twenty-five years of age it yields twice the mass of wood of any other tree. (q)

The eminent botanist who has given us the most full, accurate, and instructive account of all our forest trees, appears to have frequently adverted to this general opinion, that the concentric layers in the wood of such trees afforded evidence as well of their progress in vegetation as of their age. In speaking of the white cedar, (*cupressus thyoides*,) he says, that 'the concentric circles are always perfectly distinct, even in stocks of considerable size; but their number and compactness prove that the tree arrives at its full growth only after a long lapse of years. I have counted two hundred and seventy-seven annual layers in a trunk twenty-one inches in diameter, and five feet from the ground; and forty-seven in a plant only eight inches thick at the surface, which proved it

body below it, And though several years have elapsed, the latter has not been able to overtake the former. The upper part of the tree, rooted in the air, vastly outgrew the under rooted in the earth. Therefore it must have drawn either its whole or chief sustenance from the atmosphere. Indeed between the bark and the wood of most trees, and of the locust particularly, we find the chief channel of their juices; and the communication of those juices was utterly cut off so that neither portion of the tree could supply the other.'—*Arator*, by John Taylor, of Caroline, p. 85.

(o) 1 Mich. Am. Sylva, 59; 2 Mich. Am. Sylva, 359.—(p) 1 Mich. Am. Sylva, 330; 2 Mich. Am. Sylva, 289.—(q) 2 Mich. Am. Sylva, 11.

to be already fifty years old. I was told that the swamp in which it grew had been burnt at least half a century before, and had been re-peopled from a few stocks that escaped the conflagration, or perhaps by the seeds of the preceding year.' (r) From which it would seem, that the number of the concentric circles in the young cedar being found to correspond so nearly with the known lapse of time within which it must have grown, after all the old ones had been destroyed, might have induced this botanist to speak of this fact as a corroboration of the general opinion; yet he merely states the circumstance, and leaves the matter to the judgment of the reader. But in another place he has distinctly given us to understand, that however disposed to treat this opinion with respect, he himself had no great confidence in its correctness. In treating of the hemlock spruce, (*abies canadensis*,) he says, 'The hemlock spruce is always larger and taller than the black spruce; it attains the height of seventy or eighty feet, with a circumference from six to nine feet, and uniform for two-thirds of its length. But if the number and distance of the concentric circles afford any certain criterion of the longevity of trees, and the rapidity of their vegetation, it must be nearly two centuries in acquiring such dimensions. (s)

The inferences deducible from the apparent number of concentric layers found in the trunk of a tree, upon an inspection of a transverse section of it, is, however, a kind of evidence which can only be obtained by a posthumous examination. Such examination of the bodies of animals are common, and have often been found very instructive in relation to the purposes for which they have been made; but it is believed such an examination never was made with a view to ascertain the age of the animal, or when it would attain such a maturity as would give the greatest value and utility to its body, or that of similar animals. *Post mortem* examinations of the bodies of animals, are often made with a view to ascertain points of comparative anatomy; to observe the organization of the body, so as thereby the better to understand how living creatures of the same species should be treated in health, or in disease; or to ascertain what may have been the immediate

(r) 2 Mich. Am. Sylva, 341.—(s) 2 Mich. Am. Sylva, 318. 'In a field of arid sandy loam, long under the usual cultivation, a piece of five or six acres was covered by a second growth of pines thirty-nine years old, as supposed from that number of rings being counted on some of the stumps. The largest trees were eighteen or twenty inches through.'—*Ruffin on Calcarious Manures*, chap. 13.

cause of its death. So, too, the *post mortem* examination of a tree can be of no value for any other purpose; except it be to find a rule for ascertaining its age, and thereby the ages of living trees of the same species; or to find a rule for determining the rate per annum at which they may be expected to continue their enlargement until they reach the ultimate term of their lives.

But assuming it to be true, that the number of the concentric rings observed in the trunk of a tree, do always exactly correspond with the number of years of its age, then at least one important step would seem to have been made by such *post mortem* examinations towards ascertaining the ages of trees in general; as for example, if by the felling of an oak of thirty-four inches in diameter, it should be found to have two hundred concentric layers; and, consequently, to be two hundred years old; and so to have increased in diameter at the rate of one-twelfth part of an inch annually; and then, assuming it to be true, that all the immediately adjacent and similarly situated oaks had increased in diameter at the same average annual rate; it follows, that the age of every living oak in a similar soil and exposure, might from the measurement of its circumference, be exactly ascertained by a *post mortem* examination of any one, and so of every other species of trees. Let us follow out this hypothesis, and see to what it will lead.

It has been found, that a larch tree, in England, will, under favourable circumstances, increase, until fifty years of age, at the rate of half an inch annually in diameter; and that some elms, planted in France in the year 1580, if what is said of their circumference be correct, had increased at the same rate in diameter until two hundred and forty years of age. (*t*) But it has been observed, that the latter concentric layers of wood in an oak of no more than two hundred years of age, were so much thinner than those of its youth, as to be scarcely distinguishable; and that other kinds of trees, known to be of rapid growth in early life, have been found, by actual measurement, after they had attained a considerable age, to have remained nearly of the same circumference during the lapse of twenty years. (*u*) Therefore, after allowing

(*t*) 2 Mich. Am. Sylva, 225. 'Several elm trees, said to have been planted in the public green at New Haven, in Connecticut, in the year 1638, were standing in the year 1838, and then measured about fourteen feet in circumference; which gives an increase of diameter at the rate of about the half of an inch annually.'—*The Globe newspaper, published at Washington, 21st September, 1838.*

(*u*) 1 Mich. Am. Sylva, 324.

for differences in soil and situation, let it be presumed, that in all trees, growing in their proper climates, of three hundred years of age and upwards, each one of their concentrical layers has, during their whole lives, on an average, annually added one-sixteenth part of an inch to their diameters. Then according to such a mode of calculation, the before mentioned great chesnut tree of France, of thirty feet in circumference, must have been nine hundred and sixty years old; and thus it would seem, that the tradition and conjectures, as to its age, were nearly correct. According to the same mode of calculation, the great sycamore, (*platanus occidentalis*,) on the right bank of the Ohio, above Marietta, which was found, in the year 1802, to be at least fifteen feet in diameter, must have been then fourteen hundred and forty years of age. (w) But a much larger sycamore has been described by Pliny, as being then, in the first century of the christian era, alive and standing in Syria, whose trunk, hollowed by time, afforded a retreat, for the night, to the Roman consul Lycinius Mutianus, with eighteen of his retinue. The interior of this grotto was seventy-five feet in circumference, and the summit of the tree resembled a small forest. (x) This great sycamore must have been then, according to this mode of calculation, more than two thousand years old. (y)

(w) 1 Mich. Am. Sylva, 325.—(x) 1 Mich. Am. Sylva, 325.

(y) 'Some instances of great size and extreme longevity in exogenous trees, where the statement can be relied upon, may not be uninteresting. The *pinus lambertiana*, a species of pine indigenous to northern California, probably attains a greater size than any other known tree. One specimen measured by Mr. Douglas, an English botanist, was two hundred and fifteen feet in height, fifty-seven feet nine inches in circumference, at a distance of three feet from the ground, and seventeen feet five inches at one hundred and thirty-four feet; thus giving as the solid contents of the trunk alone, about twelve hundred cubic feet. This was probably the largest single mass of timber ever measured by man. A sycamore growing near Marietta, Ohio, measures fifteen feet six inches in diameter; or, supposing it cylindrical, more than forty-five feet in circumference. There is said to be an oriental sycamore, growing near Constantinople, one hundred and fifty feet in circumference, with an internal cavity of eighty feet. The largest oak, known in England, was called Damony's oak, in Dorsetshire, and was sixty-eight feet in circumference. With respect to the age of trees, it may be remarked, that an elm has been known to reach the age of three hundred and thirty-five years; an ivy four hundred and fifty; an orange six hundred and thirty; an olive about seven hundred; a cedar of Lebanon eight hundred; a white oak one thousand and eighty; and a yew between thirteen and fourteen hundred. De Candolle estimates the age of a Mexican cypress at six thousand years; but then his estimate was formed by dividing the semi-diameter of the trunk, by the average thickness of the layers of that species of tree, and for reasons before mentioned, cannot be relied upon. If it were indeed so old, its young shoot must have been watered by the waves of the deluge. The

On contemplating the traces of what appears to have been the long since abandoned fortifications, mounds, &c., found in the great valley of the Ohio, and in other parts of our country, there seems to be a disposition, in some, to consider them as the remains of a people partially or altogether civilized; and in order to shew that a sufficient time had elapsed for such a people, like some of the Greeks who have sunk into the barbarism of Albanians, to fall back into the condition of the savage tribes first found, by Europeans, to be inhabiting this country, the large forest trees, which had grown up out of those remains, have been felled, and the concentric rings of their trunks counted for the purpose of thus eviscerating from them evidence of the lapse of some hundreds of years since those supposed fortifications had been abandoned. But merely plausible deductions, or bold flights of fancy, however ingenious or striking, cannot be received as matters of history, much less as judicially established truths. (z)

most aged as well as the largest trees, in the northern parts of the United States, belong to the species, *platanus occidentalis*, American plane tree, as it is called in Europe, or the button wood, as it is called in New England, or sycamore, as it is more commonly called in the western and southern states. The largest and most aged trees, indigenous to the southern states, belong to the species *cupresses thyoides*, white cedar, as it is called in New England, or cypress, as it is commonly called at the south.—*Essay on Vegetable Physiology*, by Armstrong, Professor, &c., Washington College, Virg. chap. 6; *The Farmers' Register*, by Ruffin, vol. 7, No. 3.

It would seem that the *pinus lambertiana*, here spoken of, attains as great a size in the valley of the Columbia river as in California, for Mr. Nuttall, in describing a bird called Audubon's wood warbler, says: 'We may notice in this species as a habit, that, unlike many other birds of its tribe, it occasionally frequents trees, particularly the water oaks, and the lower branches of those gigantic firs, which attain not uncommonly a height of two hundred and forty feet.'—*The Birds of America*, by Audubon, 2 vol. 27.

(z) McCulloh's Researches concerning the Aboriginal History of America, Appendix 2.

'The possession of the Wyoming Valley has not been an object of the white man's ambition or cupidity alone. It has been the subject of controversy, and the fierce battle ground of various Indian tribes, within the white man's time, but for his possession; and from the remains of fortifications discovered there, so ancient, that the largest oaks and pines have struck root upon the ramparts, and in the entrenchments, it must once have been the seat of power; and perhaps of a splendid court, thronged by chivalry, and taste, and beauty—of a race of men far different from the Indians, known to us since the discovery of Columbus.'—1 *Stone's Life of Brant*, 319.

Extract of a letter from John Locke, dated Cincinnati, 10th of September, 1838, describing a place called *Fort Hill*, the remains of an ancient fortification in Adams county, in the state of Ohio.

'In the midst of the enclosed table is a pond, which, although it had recently

From what has been said, it appears, then, that some mere annual roots, and the roots of all trees, as well as the wood of most of our forest trees, exhibit the appearance, in a transverse section, of having been formed by a succession of concentrical layers; that the wood of a variety of trees which are only the growth of the torrid zone, are obviously formed in the same way: and therefore, that such concentrical layers cannot with certainty be pronounced to be the result of a succession of summer growths; or any one of them to be the growth of only one year, or of any other given space of time. It also appears, that the wood of some trees, of the growth of the temperate as well as of the torrid zone, does not, in a transverse section of it, exhibit the least appearance whatever of any concentrical layers; and that in the wood of those trees, which is so constructed, the formation of such layers is said to be checked by accident, to be much affected by soil and situation, and even by the peculiarities of the successive seasons; and moreover, that they always become thinner and more indis-

been drained of three feet of its usual contents, still, on the 25th of August, contained water. A chesnut tree, six feet in diameter, standing on the top of the wall, serves to mark its antiquity. Counting and measuring the annual layers of wood, where an axeman had cut into the trunk, I found them at nearly two hundred to the foot, which would give to this tree six hundred years. How much longer the wall had been standing, I saw no means of determining. A poplar, seven feet in diameter, standing in the ditch, allowing the thickness to the layers which I have found in like poplars, one hundred and seventy to the foot, would give nearly the same result, six hundred and seven years.'—*The Globe newspaper*, 21st Sept. 1838.

'There have,' says Goldsmith, 'been two methods devised for determining the age of fishes, which are more ingenious than certain; the one is the circles of the scales, the other by the transverse section of the backbone. The first method is this. When the fish's scale is examined, through a microscope, it will be found to consist of a number of circles, one circle within another, in some measure resembling those which appear upon the transverse section of a tree, and supposed to offer the same information. For, as in trees we can tell their age by the number of their circles, so in fishes we can tell theirs by the number of circles in every scale, reckoning one ring for every year of the animal's existence. By this method, M. Buffon found a carp, whose scales he examined, to be not less than a hundred years old; a thing almost incredible, had we not several accounts in other authors which tend to confirm the discovery. Gesner brings us an instance of one of the same age; and Albertus of one more than double that period. The age of the skate and ray, that want scales, may be known by the other method; which is by separating the joints of the backbone, and then minutely observing the number of rings which the surface where it was joined exhibits. By this the fish's age is said to be known; and perhaps with as much certainty as in the former instance. But how unsatisfactory soever these marks may be, we have no reason to doubt the great age of some fishes. Those that have ponds often know the oldest by their superior size.' *Goldsmith's Animated Nature, Hist. Fishes, chap. 1.*

tinct as the tree grows older ; and that the fibres of the wood of some are very singularly disposed, appearing to have been collected into bundles ; or to have undergone some peculiar inflexions as the tree advanced in age. We know that, here, roses do not bloom in January, that apples do not ripen so early as April, nor cherries so late as October ; and we also know, that some forest trees bring their fruit to maturity annually, and others only biennially ; that some trees are of the *monœcia* class, having the male and female organs on the same tree, and that others are of different sexes, or of the *diœcia* class, having the males and females in distinct trees. These peculiarities, and the periodical fructification of trees being known, as in the case of the known terms of the incubation and gestation of animals, the law respects and confidently relies upon such a known regular course of nature. But no series of observations, by botanists or cultivators, have as yet demonstrated that any portion of the wood of a tree, as visible to the naked eye on dissection, was, like its fruit, the result of successive periodical formations, known to have been made within certain spaces of time ; nor have philosophers, with the aid of chemistry or the microscope, been as yet able, in this and a multitude of other particulars, to detect the latent operations of the vital principle in vegetation ; leaving all questions as to its gradual or periodical progress, still covered up in the most impenetrable obscurity. (a)

(a) Thompson's Chem. b. 4, c. 3 ; 11 Westm. Revw. art. 8, p. 97 ; Vegetable Physiology and Arboriculture ; Roget Anim. and Veget. Physi. pt. 1, c. 1, s. 2 and 3, pt. 2, c. 1.

‘ We know the substances received by plants, and those which they reject ; we determine by analysis the nature and the composition of the products which they form ; but this is the utmost extent of our knowledge. All that passes within the plant is still a mystery, and belongs to the laws of vitality, which modify by their action those physical laws that are known to us.’—*Chaptal's Chemistry applied to Agriculture*, c. 5, art. 6.

‘ Plants may be considered as a set of machines by which the common elements of nature are worked up into such a form as to be fit for the sustenance of animal life. We have already examined the structure of this machine ; we will now direct our attention to the way in which it operates. In this department of the science, the difficulties which the philosopher has to overcome are of a very different character from those which may have embarrassed him in merely determining the organization of the plant. In the latter case, good microscopes, manual dexterity in preparing the parts for examination, and sufficient patience for his task, are sure to bring the observer to conclusions, the general truth of which is often susceptible of exact demonstration ; but when we come to consider the causes of vital phenomena, and the manner in which they are brought about, we have obstacles of quite another kind to overcome. There is not a function of vegetable life

In this case the block here produced, has been cut out so deep from the trunk of this black oak, as to include, with the bark and all the newly formed layers of wood, eighteen others which had been formed when the chop mark was made. Judging from the appearance of the block, and the segment of the circle formed by its outside, I should suppose that the tree was about one foot in diameter, and was at present in a youthful and vigorous state of vegetation. The block distinctly exhibits the new wood as being in every way perfectly united over the whole of the chop mark. Immediately over the chop mark there is much horny wood in which no concentrical layers are visible; but on one side of the chop mark, and where the concentrical layers appear to be a perfectly natural continuation of those into which the chop mark had been made, there can be counted no more than *twelve* additional concentrical layers. These new layers differ very much in thickness one from another, and altogether measure as much in diameter as the eighteen which had been previously formed. The whole or a part of the epidermis, or outside bark through which the chop mark was made, apparently still remains, with a perfectly formed new bark so closed over it as to leave nothing more than a scar or cicatrice where the chop mark had been made.

The witnesses testify, that this chop mark was shewn as having been made in the year 1791, now thirty-nine years ago, in accordance with which, if the hypothesis that each concentrical layer denotes the lapse of a year, be correct, there should have been found that number of concentrical layers; but there are no more than *twelve*; and, consequently, the testimony of the witnesses, or the evidence derived from this hypothesis must be rejected. There is nothing whatever, in addition to this hypothesis, to impeach the credibility of the witnesses.

which is not performed, as it were, behind a screen; the parts which are the prime movers in every operation, are so minute as to escape our view until they have been killed for microscopic examination—fixed to the soil, destitute of passions and sensations, the visible expressions of which might lead us to the discovery of their visible causes—having the whole of its organic mechanism concealed beneath a skin inert and opaque—we are compelled to trust for all our notions of the manner in which a plant performs its vital functions, to inductions from data about which, in many cases, there must always, from the nature of things, be some kind of uncertainty. In such circumstances, can we wonder that great diversity of opinion has existed among physiologists, respecting many of the phenomena of vegetable life; or that multitudes of erroneous theories have obtained belief almost without question.’—*Essay on Vegetable Physiology, by Armstrong, Prof., &c., Washington College, Virginia, chap. 15; The Farmers’ Register, by Ruffin, vol. 7, No. 7.*

I have nowhere met with the mention of any one single instance, in which the number of the concentric layers, which could be distinctly counted, in the transverse section of the trunk of any forest tree, of a foot or more in diameter, had been found exactly to correspond with the years of its age, *as otherwise well and positively known and ascertained*. Yet it is most manifest, that until the regular, uniform, and exact coincidence between the number of the concentric layers in the wood of trees and the years of their age, has been so demonstrated by observation and proof, as the term of gestation of animals has been, &c., there can be no clear and sure foundation for the hypothesis, that the number of such concentric layers does denote the age of trees, or the progress of their growth. But even if this notion were shewn to be well founded, it would call for evidence destructive of that by which it was given. The production of the necessary evidence of the lapse of years, by cutting out, as in this instance, a block of sufficient dimensions to exhibit a distinct view of the number of the concentric layers, formed since the time in question, might occasion the death of the very boundary tree intended to be shewn and re-established; so that the production of such evidence would, by destroying that of which it had been a component part, prevent a recurrence to the same kind of proof thereafter; or, in other words, to prove a living boundary by such means, it would be necessary to destroy it. This hypothesis, however, resting, as it yet does, altogether upon speculation and conjecture, cannot be judicially regarded as affording evidence worthy of any consideration whatever.

Rejecting this hypothesis, the testimony of the witnesses stands in all respects unimpeached, and the line must be carried to the black oak, as called for and proved; and, consequently, no vacancy is left between *Jolly's First Attempt*, and *Long Fought and Dear Bought*, over which a resurvey from *Litten's Fancy*, can be so extended as to embrace any part of *M'Causland's First Attempt*.

Whereupon it is *Ordered*, that the caveat of *Robert M'Causland* be sustained; that the caveat of *Patterson & Ellicott* be overruled; and that *Patterson & Ellicott* pay the costs of both caveats, to be taxed by the Register.

HEPBURN'S CASE.

Where jurisdiction in a particular case is conferred on the Chancellor by a special act, he follows the authority exactly as given. All our governments are mere delegations of power for the benefit of a sovereign people. No unlimited discretionary power can be conferred on the judiciary by the Legislature. By virtue of the power of *eminent domain*, private property may be taken for public uses; but private property cannot be taken from one and given to another in any way. The state may, as against itself admit the truth of any fact, or waive the benefit of any rule of law. The Legislature may by law, remove difficulties, or grant facilities, as between individuals, without prejudice to private rights.

Before the revolution there was a *legal* money of six shillings to the dollar, and a *current* money of seven shillings and six-pence to the dollar; but the accounts of executors and administrators were always adjusted in *legal* money. No one can be allowed to discredit his own testimony.

The lapse of years cannot fail to give rise to an unanswerable presumption against the validity of an antiquated claim of any kind. The statute of limitations must be pleaded or specially relied on; but a presumption of satisfaction, arising from lapse of time, may, without putting it as a defence upon the record, be taken advantage of at the hearing. Lapse of time is a defence available against the state; and may well be taken advantage of by it. A presumption of satisfaction rests on two facts; first, that the creditor had a remedy; and secondly, that the debtor himself was, or had property within reach of that remedy.

The debts of a debtor were formerly, as a matter of grace, always paid out of his forfeited or escheated estate. The revolutionary confiscation acts gave to the creditors of alien enemies, remedies as effectual as those taken away; and removed no property beyond the reach of such creditors. The object of the judicial proceeding by attachment is to enable a creditor to obtain satisfaction from his absent debtor's property found here. Although a non-resident alien enemy cannot sue; yet a citizen creditor may, by attachment, obtain satisfaction from the property found here of such alien debtor. The nature and principles of the revolutionary confiscation acts considered and applied.

John M. Hepburn presented a petition to the General Assembly by which he claimed from the state a large sum of money as administrator *de bonis non* of *John Hepburn*, deceased, who was a creditor of *William* and *Robert Mollison*, whose property had been confiscated, leaving the claim of the petitioner, as he alleges, unsatisfied. Upon which the following resolution was passed:

Resolved, That the Chancellor of Maryland be, and he hereby is authorized and directed to examine into the merits of the claim of *John Hepburn*, as creditor of *William* and *Robert Mollison*, against the *State of Maryland*, and to decide thereon according to the equity and right of the matter, which decision shall be conclusive in the premises; and if the Chancellor shall find any sum to be due, the same shall be satisfied out of the funds arising from the confiscation and sale of the property of the said *William* and

Robert Mollison, which may remain in the treasury unappropriated. And on the part of the *State*, it shall be the duty of the Attorney-General, or one of his deputies, to attend the investigation. (a)

16th December, 1830.—BLAND, *Chancellor*.—This case standing ready for hearing, and the solicitors of the petitioner and the Attorney-General having committed their several arguments to writing, they with the proceedings were read and considered.

In England, as in this instance, jurisdiction is frequently given to the Chancellor by private or special acts of parliament; and in all such cases he adheres strictly to the special authority so given. (b) Here too, the Chancellor has always held himself bound to follow the authority exactly as given to the full extent of the constitutional competency of the General Assembly to confer any such authority. But in this case the solicitors of the petitioner and the Attorney-General differ materially as to the meaning of this resolution.

On the part of the petitioner it is contended, that the Legislature meant, that neither the lapse of time should be relied on as a defence; nor that the technical rules of equity which prevail between individuals should be applied to the case.

On the other hand the Attorney-General insists, that all the substantial principles of equity by which a similar controversy between individuals would be governed, should be applied to this case.

This difference as to the intention of the Legislature, renders it necessary to determine, in the first place, what are the principles by which the Chancellor is to be governed; since it is obvious, that the general complexion of the investigation, as well as the final judgment, must altogether, or very much depend upon the circumstance, from which of those positions he sets out. And, therefore, this preliminary question must be disposed of before the case itself can be considered.

It may be safely assumed, as well settled, that all our governments are, in their nature, delegations of power, that they are trusts exercised for the use and benefit of a sovereign people; and that the governments of the states, though less limited than that of the Union, yet have their *general* as well as their *special* limitations. (c) And therefore, it may well be doubted whether the General Assembly of this state can, constitutionally, make any capricious or arbitrary disposition of the money or property of the

(a) 1828, No. 26.—(b) 2 Mad. Chan. 719; Mitf. Plea. 31.—(c) *Calder v. Bull*, 3 Dall. 386.

republic; or can be allowed to indulge their feelings of benevolence in bestowing such property on any one, merely as a generous donation, without regard to any consideration of public good. The discretionary power of the General Assembly, it may be admitted, is and must be extensive; perhaps, beyond control from any other co-ordinate department of the government; but still it must be limited by a sound regard to the general benefit of the people; and therefore, should not be allowed from a mere impulse of kindness to make a gift of the public funds to any one who had rendered no service to the state; nor done any thing that might be considered as a valuable consideration or a public benefaction. (*d*)

If the unlimited discretionary power of the General Assembly themselves over the public property can be susceptible of question, surely no court of justice should consider itself as having been clothed with any such power by that department, without the most express declaration to that effect. This court must therefore, be extremely guarded how it assumes an authority from the Legislature to dole out the charities, or to cast abroad the bounties of the state. If however, laying aside the rules of law and equity by which the rights of property are regulated, it is to be determined upon principles of general morality, whether or not a petitioner is to be paid from the public treasury any amount he may ask or claim, then the General Assembly must be much better judges of such a matter than the Chancellor, because they are presumed to be, and are in truth, much more intimately acquainted with the feelings and disposition of the people than any single member of the judiciary can be. But I cannot allow myself to believe, that the General Assembly intended to clothe the Chancellor with any such large and unqualified powers. He is directed to decide according to the equity and right of the matter; that is, according to those established rules by which he is governed in similar cases;

(*d*) 3 Secret Jour. Cong. 197; 1784 ch. 37, s. 7; 1788, ch. 41, s. 20. Construction construed, by John Taylor, of Caroline, 261.

'We, (Congress,) are not the almoners of the American people, the dispensers of their charity, but agents, with limited powers, entrusted with the control of the public purse, for the sole purpose of applying it to the current exigencies of the government, in the advancement of great principles of public policy connected with the exercise of powers substantively conferred upon us, and in the discharge of individual claims arising from our own, or the engagements of our predecessors.' *Speech of Mr. Berrien, a Senator of Georgia, in the Senate of the U. States, 30th January, 1828.—National Intelligencer, 19th April, 1828.*

not by any variable and uncertain notions of liberality and benevolence.

Prudential and equitable considerations ought always to curb licentious invasions of private right. (*e*) But the government of this republic by virtue of that *eminent domain*, which for public purposes is entrusted to all governments, may take the property of any individual and cause it to be applied to the use of the public, on making him a reasonable compensation. But it cannot arbitrarily take property from one citizen and bestow it upon another; because such an act, although not specially prohibited by the constitution, would be contrary to the fundamental principles of the government itself. (*f*) If such a transfer of property could not be openly and directly made, it certainly could not be done covertly or circuitously; and therefore, in any reference of a case to the judiciary, as in this instance, the Legislature could not command a court of justice to stay, or depart from its regular course of proceeding in a particular case; (*g*) or arbitrarily to assume any fact, not admitted by the party, which would give rise to a legal or equitable principle destructive of the interests of creditors, or of the right of property of such party; because it would be, in effect, and indirectly, to transfer such property from one person to another. (*h*) Even during the provincial government, when the General Assembly of the province was held to be endowed with a sovereign and unlimited power, similar to that claimed by the parliament of England, such an assumption of facts and consequent transfer of property, was considered as so dangerous and unjust an act as to call forth a solemn protest from one of the most profound lawyers of his time. (*i*) Therefore, where the facts have been assumed by the Legislature in their reference of the case to the Chancellor, although he may act upon them, as has been done in some instances, if they should be admitted by the party, or there should be no opposition; yet, without such consent, it might be difficult for him to acquiesce under such an assumption where the rights of a party were materially affected by it. (*j*)

But as the General Assembly must be allowed to have a large discretionary power over public property and money in the treasury;

(*e*) 3 Secret Jour. Cong. 193.—(*f*) The Federalist, No. 44; Trustees of the University v. Foy, 2 Hayw. 310, 374; Dash v. Van Kleeck, 7 John. 477.—(*g*) 1827, ch. 141.—(*h*) Satterlee v. Matthewson, 2 Peter. 380.—(*i*) Partridge v. Dorsey, 3 H. & J. 307, note.—(*j*) May v. May, Buller N. P. 112; Campbell's case, 2 Bland, 230.

I should without difficulty yield to any assumption of facts, affecting the rights of the state only, in favour of an individual. And upon the same principles the state may, for itself, waive the benefit of any rules of law or equity which operate in its favour.

As where in a suit instituted in Chancery on a controversy which arose between the intendant and a purchaser of confiscated property, the case was, by a resolution of the General Assembly, directed to be referred to arbitration; (*k*) and the arbitrators having made an award in which they stated, that their powers, under the resolution, were not sufficiently extensive to enable them to do complete justice, the case was, by another resolution referred to the Chancellor with directions to enquire into the principles upon which the award was founded, and upon consideration of all circumstances to decree as equity and justice might require. (*l*) Upon which the Chancellor declared, that he considered it to be the meaning of the General Assembly to place him in the room of the arbitrators, whose powers were defective, and to enlarge the submission so that complete justice might be done. And therefore he held, that it would not be consistent with his duty to consider the case in the same light as if the contest were between two individuals coming before him for decision according to the principles established by preceding determinations in Chancery; and he proceeded to dispose of the case accordingly as an arbitrator would have done. (*m*)

In that instance the state not only admitted the facts in favour of an individual, but also waived all the strict rules of law and equity of which it might have taken advantage; and liberally directed the case to be submitted to arbitration unembarrassed by any forms or rules whatever. The resolution under consideration involving a claim upon property in the hands of the state, although peculiar and special in its nature, must be regarded as a public law of which the courts are bound to take notice. There are, however, many instances in which the Legislature has, by private acts, interposed, without prejudice to any private rights, to remove difficulties and give facilities in the disposition of property in which the state had no interest; by providing modes of leasing, mortgaging or selling legal or equitable estates of deceased persons for the payment of their debts, or to save the more profitable personalty;

(*k*) Resolution, 1784, No. 4.—(*l*) Resolution 24th May, 1787.—(*m*) *Garretson v. The Attorney-General*, 18th August, 1790; *Chancery Proceedings*, lib. D. fol. 385.

or so that the property might be made productive for the relief of the necessities of those interested; or to enable infants to convey in pursuance of a will under which they took as devisees. Under such laws the Chancellor proceeds according to the mode prescribed, pursuing the ordinary course of proceeding in aid of such private acts, and only so far as they are silent as to the mode of proceeding and the powers conferred by them may be so executed, and are constitutional. (*n*)

Here it is perfectly manifest, that the resolution by which this case has been referred to the Chancellor, makes no assumption of facts; nor admits any; nor, on behalf of the state, waives the benefit of the well established principles of law or equity properly applicable to the merits of the case; but on the contrary it calls upon the state's chief law officer to attend and defend its rights and interests. (*o*) The case was presented to the General Assembly by petition, accompanied by sundry vouchers and documents; and, in that form, it has been turned over to the Chancellor to adjudicate upon; and hence, discarding the mere forms and modes of proceeding by which controversies are brought before this court, and prepared for final decision and nothing more, the case must be heard and disposed of according to the substantial principles of equity, as if it had been brought here pursuant to the regular course of proceeding. And, consequently, without any reference to the mere forms peculiar to this court, the claim must be considered on its merits; that is, as a common controversy between a creditor and debtor, merely putting the state in the place of the *Mollisons*; but giving to the creditor every advantage he ought to have, upon the ground that the acts of the state, if any such there be, have embarrassed, postponed, or destroyed his remedy against his debtors, the *Mollisons*, without affording him another equally efficient.

Proceeding then, to consider this case as one, which like all others, legally submitted to the Chancellor for adjudication, must be governed by the principles of law and equity arising out of the facts of which it is composed, it will be necessary in the first place to gather up all those facts, and exhibit them in their proper order. The case as to facts stands thus:

It appears that *William* and *Robert Mollison*, merchants resident in London, were some time before and until about the year 1775,

(*n*) *Cambells*, 2 Bland, 230; *Williams' case*, post; *Hughes' case*, 1 Bland, 46; *Iglehart v. Armiger*, 1 Bland, 520.—(*o*) 3 Blac. Com. 256; Mitf. Plea. 31.

very extensively engaged in trade to this country ; that they had five separate stores in Maryland managed by agents ; some of whom, without being publicly acknowledged as such, continued to reside here during the revolutionary war ; and after the peace of 1783, they had, in this country, several active and openly acknowledged agents, charged with the settlement of their former commercial affairs. That the *Mollisons* had, so long as they carried on their trade, large consignments of tobacco made to them from time to time by various persons of Maryland ; and had debts due to them by a number of persons here, to a very large amount ; that they suspended their payments about the year 1776 ; but some of their creditors received payments on account of claims against them as late as the year 1793.

It further appears, that the late *John Hepburn*, during his lifetime, had shipped several parcels of tobacco to them ; that *Hepburn* made his will and died some time in the year 1775, in Prince Georges County, leaving *Samuel C. Hepburn* as his executor, who acted as such accordingly ; that the *Mollisons*, by their letters, admitted themselves to be indebted, on the 1st of April, 1776, to the estate of the late *John Hepburn*, on account of shipments of tobacco, to the amount of £316 sterling, equal to \$1,404 44 of our present legal money ; that the executor *Samuel C. Hepburn*, on the 15th of March, 1776, drew a bill of exchange in favour of *Philip Thomas* upon the *Mollisons* for the sum of £260 sterling, directing in the bill itself, that the same should be placed to the account of the estate of *John Hepburn, Esq.* ; for this bill *Samuel C. Hepburn* received of *Thomas* good legal money of the time, not continental currency ; and *Thomas* sold and endorsed it to *Willing, Morris & Co.* who had it presented for acceptance, which was refused, and it was protested accordingly ; of which the holders, in a letter dated on the 31st of March, 1777, gave notice to *Samuel C. Hepburn* the drawer, which letter reached him some time in April following. That in an account, altogether in the hand-writing of the executor *Samuel C. Hepburn*, and purporting to be an account made out by him as executor, there is, among others, one entry in these words : '12th January, 1779, by cash received in part of *W. & R. Mollison's* balance, £260 ;' and another entry, and the last one, is in these words : '8th April, 1789, to cash paid *S. Hepburn's* bill on *W. & R. Mollison*, returned protested, £520 11s. 3d. common currency.' That in another account, altogether in the hand-writing of one of the registers of wills of Prince Georges county em-

bracing every item of that in the hand-writing of the executor except the before mentioned last one in it, in which there is, on the debit side, an entry in the following words: '1779, January 12th, with £433 6s. 8d. continental money received of *W. & R. Mollison* for £260 sterling, in part of their balance, is specie at 10 for 1, £43 6s. 8d.'

It further appears, that the whole of the debts due to the *Mollisons*, with all their property in Maryland, were liable to the operation of the acts of October, 1780, ch. 5 and 45, and the laws subsequently passed in relation to the same subject; that in the year 1782, two special acts of Assembly were passed authorizing *Thomas Contee* to collect debts due to the *Mollisons* in this state, to satisfy himself and their other creditors and to pay the residue into the treasury; that on the 13th of September, 1784, the holders of the bill of exchange commenced suit upon it against *Philip Thomas* the endorser, and having obtained judgment, it was superseded by him, and on the 20th of May, 1786, the drawer, *Samuel C. Hepburn*, became one of the sureties in the superseder's bond; which judgment was afterwards on the 16th of June, 1789, fully satisfied by *Hepburn*. That *Samuel C. Hepburn* the executor received assignments of debts due to the *Mollisons*, amounting together to \$840 71; one of which assigned debts due from *Jonathan Simmonds*, having been secured by a bond given to the executor on the 26th of August, 1790, must have been assigned before that time; but when does not appear. There is nothing to shew the exact time when any of the assignments were made; from any thing that does appear they might all have been made before the year 1790.

It further appears, that an advertisement was inserted for six weeks in the Annapolis newspapers, in the year 1806, calling on the creditors of the *Mollisons* to meet their agent to hear propositions respecting claims against them, of which the executor *Hepburn* had notice; that the executor *Samuel C. Hepburn*, always resided in Prince Georges county, where he died about the middle or latter end of the year 1806; that on the 22d of June, 1821, a bill was filed by the petitioner *John M. Hepburn* and others, as the representatives of the late *John Hepburn*, entitled to the residue of his estate; making this claim against the state, and stating, that large sums had been paid into the treasury under the act of October, 1780, ch. 5; out of which they prayed, that the claim might be satisfied; then prayed process against the *Mollisons*, the trea-

surer of the state, and sundry others said to be the debtors of the *Mollisons*, who had paid money into the treasury. None of the defendants answered, and the bill was dismissed by the complainant's solicitor in open court on the 6th of December, 1821. And finally, that the present petitioner *John M. Hepburn* was, on the 30th of January, 1826, appointed administrator *de bonis non* of the late *John Hepburn*, by the Orphans Court of Washington county, in the District of Columbia, by virtue of which he has been invested with a capacity to sue in this state. (*p*)

By an order of the House of Delegates, passed on the 18th of December, 1823, this case was referred to the Auditor General; and he, taking the entries and vouchers as they stood, according to their dates and natural import, stated an account by which it appears, that, charging the *Mollisons* with the whole debt due as of the first of April, 1776, amounting then to £316 sterling, or \$1,404 44 of our money, principal, and giving them credit for a payment of £260, or \$1,155 56, as of the 12th of January, 1779, and then giving them a further credit for \$840 71, the amount of the assignments as of the year 1790, calculating interest both for and against, the estate of the late *John Hepburn* had been overpaid \$7 92. This at first blush seemed to be the plain and natural result of the whole affair.

But it has been urged, that the late *Samuel C. Hepburn* drew a bill of exchange upon the *Mollisons* on the 15th of March, 1776, for just the amount of £260, and that the payment of £260 was in truth no more than a credit for the proceeds of the bill of exchange. The whole controversy turns upon this point; whether the bill of the 15th of March, 1776, and the payment, as stated, of the 12th of January, 1779, are identical. This assertion, that the bill and the entry are the same, places them in direct contradiction to each other. The bill is too explicit, and too well fortified to be impugned in any single particular; and therefore, all the efforts of the petitioner have been directed against the entry to make it conform to the bill; and thus the matter in dispute is still further reduced to the single point as to the truth or falsehood of the entry of the 12th of January, 1779.

That entry, as it stands, purports to be an admission of the receipt by *Samuel C. Hepburn* of £260, as a payment from the *Mollisons*, in part of a pre-existing debt due from them. It makes

not the slightest allusion to any contingency upon which it was to be considered as a payment or not ; it does not intimate, that it was the proceeds of the sale of a bill of exchange, or any thing else, which might or might not be deemed a payment, according to circumstances ; but simply affirms the fact of a payment of the specified amount having been made on that day by the debtors to their creditor, and nothing more. It is by no means sufficient, as has been contended, to correct the mere date of the entry, in order to reconcile it with the bill ; the whole sense of its language must also be so changed to convey the idea, that it was not merely a payment, but the receipt of the proceeds of the sale of the bill of exchange for the benefit of the testator's estate, which might eventually be a payment ; or by which the estate might be involved in much loss. Nothing of the kind is, however, intimated. To sustain the petitioner on this ground, it is necessary that this entry in its date, sense, and substance should be altered, contradicted, and falsified.

If the petitioner were competent thus to impeach his own evidence, the mistake or untruth should be shewn in the clearest and most satisfactory manner ; but here he has offered, for that purpose, nothing more than inferences and plausible conjectures deduced from dates, sameness of amount, and the circumstance, that so many different items of the account could not have belonged to the same date.

As to the improbability of the payment in the year 1779 ; because of the interruption of all intercourse between this country and England by the war, it will be sufficient to remark, supposing the fact to have been so, that the *Mollisons* had a very large amount of debts and property in this state, and that at least two of their former agents remained here during the whole war, one of whom, there is reason to believe, from the transactions in relation to the special acts of Assembly of 1782, was certainly faithful and as active as he could be during the time and in the peculiar circumstances.

There is, however, nothing which shews, that *Samuel C. Hepburn*, the drawer of the bill of exchange, seriously intended it should be considered as a transaction properly and exclusively belonging to the estate of his testator. The bill itself indicates on what fund it was drawn ; but nothing more ; and there can be no doubt, that the executor intended thus to collect a part of the assets of his testator. But if he had meant it should be considered as

altogether an affair of his testator's estate, he would certainly have so expressed himself; and it was his duty, most distinctly, to set forth that intention, if the facts were so; because, if the bill had been sold above par, the profit, in that case, belonged to the estate of his testator; and upon that ground alone, if it had been returned protested, the estate of the testator could have been made to bear the loss.

To shew, that this bill of exchange was, in truth, made a part of the affairs of the estate of the late *John Hepburn*, the petitioner places great reliance on the entry of the 8th of April, 1789. But it must be recollected, that at a very early period, dollars were made a legal tender at six shillings each; (*q*) which afterwards, in a spirit of rivalry with the other colonies, and to retain the then circulating coin in the country, became current at seven shillings and sixpence each; and that to prevent the evils arising from such fluctuations in the current coin of the colonies, the government of the mother country interposed and directed, that dollars should pass in all of them at six shillings, which was affirmed by the Legislature here; (*r*) so that although the distinction between *legal* and *current* money was still kept up by the habits of the people, accounts of executors and administrators were settled with the courts in *legal* money at the rate of six shillings to the dollar; (*s*) even after dollars were, by law, made a legal tender at seven shillings and sixpence, (*t*) until such accounts were, long afterwards, directed to be stated in dollars and cents. (*u*) These circumstances gave rise to many mistakes and much perplexity. (*w*) Whence it became a general habit for executors and administrators, before, and continued to be so for some time after the revolution, to submit their papers and vouchers to the Register of Wills; who made all the proper corrections, and put the account into legal form. (*x*)

The necessity for this aid from the register was increased at the time this executor *Samuel C. Hepburn*, proposed to pass his account; because of the variety of the kinds of current money of which its numerous items were composed, and the peculiar depreciation of some of them. (*y*) The necessity and importance of

(*q*) 1686, ch. 4.—(*r*) Royal Proclam. 18 June, 1704, 6 Anne, c. 30; 1708, ch. 4; Chal. Pol. Ann. 367.—(*s*) Dep. Com. Gui. 20, 44.—(*t*) June, 1780, ch. 8, s. 19; November, 1781, ch. 16.—(*u*) 1798, ch. 101, sub ch. 6, s. 5.—(*w*) *Parker v. Mackall*, 2 Bland, 66, note; *Woodward v. Chapman*, 2 Bland, 69, note.—(*x*) Dep. Com. Gui. 20. (*y*) The Chancellor's case, 1 Bland, 635.

this help to the executor is made quite manifest, by comparing the account in his own hand-writing with that in the hand-writing of the register ; from which there can be no doubt, that the register's draft must have been formed from that in *Hepburn's* hand-writing, and also from *Hepburn's* explanations and additional information.

According to the register's draft, we have then the entry of the 12th of January, 1779, not only re-affirmed, as to date ; but with this additional information, that it was a payment then made in continental money ; and the register, having been assured by the executor, that it was so then received, has correctly applied the scale of depreciation of that year to it ; (z) which conclusively shews, that there could have been no mistake about it as to date. The register's draft also shews, that the executor could have sustained no loss by the depreciation ; because, as he received, so he paid. But the bill of exchange is shewn to have been drawn and sold early in 1776 ; and yet, its existence is not noticed in these accounts until the 8th of April, 1789 ; and then, when it is first brought into view, with all its accumulations of damages and costs, as a charge against the estate, the register excluded it altogether, and most justly ; because the estate not having profited by the sale of the bill in 1776, it clearly could not be charged in 1789, with the amount for which it was drawn, much less with the damages and costs occasioned by its protest.

Hence the fair and necessary conclusion is, that the negotiation of this bill of exchange was conducted as a separate concern of *Samuel C. Hepburn's* own ; and that it was not, in reality, connected in any way with, or taken into any account which he settled and passed as executor. According to this view of the subject, which I am satisfied is the correct one, there is no contradiction or mystery ; all the entries in the accounts, the bill of exchange, and other circumstances, are perfectly reconciled, and stand well with each other.

But it is a rule of sound sense, as well as of law, universally admitted and applicable to all cases, that no one can be allowed to discredit his own testimony ; any more than he can be permitted to contradict himself, or to deny any of his own solemn admissions. To this rule, it is believed, there is no exception. A party may be allowed to urge, that any principle of law whatever is deducible from the facts he produces, but he can in no case be suf-

(z) May, 1781, ch. 17, s. 2 ; The Chancellor's case, 1 Bland, 635.

ferred to exhibit proof of facts; and then to prove in any way, that the proof so exhibited by himself is false. In this instance, the petitioner does not merely deduce principles of law from the testimony he exhibits; but the entry of the 12th of January, 1779, is exhibited as a part of his proof, and proves the simple fact of payment; and then he produces circumstantial evidence to shew, that the entry is untrue; that there was no payment at that time; nor indeed any payment at all; but a mere credit for the proceeds of a bill of exchange sold in 1776. This latter proof is utterly incompatible with the first; the one or the other must be false. The entry is, however, a material part of the petitioner's own proof; he cannot, therefore, be allowed thus to impeach and falsify his own testimony. (a)

But the petitioner blends all the transactions in relation to the bill of exchange, with the accounts of *Samuel C. Hepburn*, as executor, and thus attempts not only to falsify an entry in his hand-writing, to shew that no such payment, as there stated, was in fact made; but he also uses the bill of exchange to swell the debt said to be due from the *Mollisons*; and so to increase the demand against the state.

The holders of the bill instituted suit upon it against *Thomas* the endorser, and recovered, according to the act for ascertaining what damages shall be allowed on protested bills of exchange; (b) over and above the principal, with costs of protest and suit, twenty per cent. damages. *Samuel C. Hepburn* being liable, as drawer, for the whole, he accordingly paid the whole amount. And now the petitioner contends, that those damages and costs must be considered as a part of his claim against the *Mollisons* and the state. But I know of no rule of law by which the *drawee* who refuses to accept a bill, even where he has funds in his hands at the time, can be charged with the damages and costs of protest. And if the *Mollisons* cannot be so charged, then there certainly can be no claim, on that account, against the state, who stands in the place of the *Mollisons* only, even supposing those damages and costs of protest to have been actually paid out of the estate of the late *John Hepburn*. Upon *Samuel C. Hepburn's* receiving notice of the non-acceptance of the bill, his right to sue, which by drawing it, he might be said to have tacitly consented thus far to suspend,

(a) *Fenton v. Hughes*, 7 Ves. 290; *Purcell v. McNamara*, 8 Ves. 327; 1 Brown Civil Law, 478; *Queen v. The State*, 5 H. & J. 232.—(b) 1715, ch. 7; 1785, ch. 38.

was completely restored; and the express object of giving him notice was to enable him at once to collect his debt, or to draw his effects out of the hands of the *Mollisons*; which, at the time he received the notice, amounted to \$1,404 44, with interest from the first of April, 1776, when the whole debt became due.

Not satisfied with pressing the transaction of the bill of exchange for the purpose of adding to the amount of the demand against the *Mollisons* and the state, the petitioner attempts to use it as a means of accounting for the long standing of his claim, for more than half a century. The debt became due on the first of April, 1776, and the *Mollisons* might have been then, or at any time after that, sued for it, in England where they resided, or their effects might have been attached here. But it is urged, that between the years 1779 and 1789, the executor had no claim against the *Mollisons*, he having lost it by the sale of the bill of exchange, and it only having been revived in him by his *payment* of that bill; or in other words, that the drawing of the bill suspended his right to sue until after its being protested he had paid the whole amount on the 16th of June, 1789; and thus the lapse of the first thirteen years is happily, though singularly accounted for.

It is, however, clear, that although a bill of exchange may be made payable at any length of time after sight, yet if it be not accepted, suit may be brought against the drawer and endorser before the day of payment arrives; and the drawer may, on being notified of the non-acceptance, proceed forthwith by suit against the drawee to recover his effects out of his hands, upon which the bill was drawn. It is, therefore, perfectly manifest that the drawing of the bill could not have, in any way, prevented *Hepburn* from collecting his debt from the *Mollisons*. It may be admitted, that he was excusable in not proceeding against them until he heard the fate of his bill; but certainly after being notified of its non-acceptance, further indulgence could not have been expected by the *Mollisons* themselves. And the further delay of the executor cannot but be considered as a great neglect of the interests of the creditors and next of kin of his testator. So far, therefore, from this transaction of the bill of exchange furnishing any reasonable apology for that delay of about thirteen years, the executor can be relieved from the imputation of gross negligence in no other way than by shewing, what I believe to be the truth, that he actually did receive payment, as stated by himself, on the 12th of January, 1779, of £260, and obtained assignments for the balance sometime in or before the year 1790.

Upon the first branch of the case I am of opinion, that there is sufficient evidence to shew that this debt, once due to the estate of the late *John Hepburn*, has been long since paid and satisfied by the *Mollisons* themselves. And I might here safely rest the case; but a sense of duty to the state, and a respect for the apparent sincerity and zeal with which the claim has been pressed by the petitioner, induce me to proceed with the investigation in relation to its being barred by the statutory provision, by which it is said to be embraced, and by the presumption of satisfaction arising from the great lapse of time.

These terms of opposition are founded on the supposition, that there is no direct proof that the debt has been fully paid. And in proceeding upon that supposition, one of three positions must be taken; first, that no partial payment has been made, in which case the presumption of payment must begin to run from the first of April, 1776, when the whole debt became due; or secondly, that there has been a part payment made of £260, which being in itself an acknowledgment of the debt on the 12th of January, 1779, when it was made, the estimate of the presumption must commence from that day; but if, in the last place, as has been urged, the entry as to the £260 must not be considered as a payment, then there being no payment but that of the assignments in the year 1790, the presumption of satisfaction can only rest on the lapse of time since that period.

It must be recollected, however, that the positive statutory limitation here alluded to, (c) is not like the common statutes for limitation of actions, which allows the party a certain time to sue, after his right has accrued, but it specifies the first of September, 1787, as the day, after which no claims of the kind described therein shall be made against the state; and consequently, if that limitation embraces this case, this claim, as against the state at least, has been precluded and barred from that time. From the nature of this case, this positive limitation, and the presumption of satisfaction may, with convenience, be considered together, and I shall, therefore, so consider them.

I have shewn that it must have been the intention of the General Assembly, in referring this case to the Chancellor, that he should be governed by those substantial principles of equity applicable to all similar controversies; and that the mere forms of proceeding,

and technicalities peculiar to the course of this court, and nothing more, were to be put aside. But it is asked on the part of the petitioner, in reference to the statute of limitations and the lapse of years relied on as a defence on behalf of the state; why this shew of justice and liberality, if the technical presumption arising from the lapse of time, of which the Legislature were fully advised, was to be relied on as a bar?

But as I have said upon a former occasion, in this, as in all other cases, it must strike every one, that the lapse of years cannot fail to give rise to an unanswerable presumption against the validity of an antiquated claim of any kind, however much it may have been originally a favourite of the law, as in cases of dower or the like. I cannot think it a reasonable demand on the court, to give parties the advantage of a stale and antiquated claim, to suffer them to make the court the depository of their slumbering rights; and then to come and revive them, when, from lapse of time, it is become utterly impossible to ascend to the whole justice of the case. There is surely a principle of limitation in the administration of every system of jurisprudence, to be derived out of the nature of things, which does entitle the court to avail itself of the universal maxim, *vigilantibus non dormientibus subveniunt leges*. (d) The maxims which refer to descents, discontinuances, non-claims, and collateral warranties, are only the wise arts and inventions of the law, to quiet possessions and strengthen the rights of property. (e) And in England it has been generally thought, that sixty years, the limitation to writs of right, is too long a time for titles to remain in dubio; and it has often been lamented there, by eminent lawyers, that the period had not been shortened. (f)

It is true that a mere formal plea of the statute of limitations has been, in some cases, said by courts of common law, not to be a plea to the merits. But a reliance upon the presumption arising from a great lapse of time has never been considered in Chancery as a defence of the same rigid and technical character. The statute of limitations, in equity as at law, must always be pleaded or specially relied on as a defence; but a presumption founded on a long lapse of time is a defence, which has always been allowed

(d) *The Rebecca*, 5 Rob. Adm. Rep. 104.—(e) *Dudley v. Dudley*, Prec. Cha. 249.—(f) *Gilb. Exeu.* 12; *Charlwood v. Morgan*, 1 New Rep. 66; *Stackhouse v. Barnston*, 10 Ves. 469.

to be made at the hearing, or trial as a matter of substance arising out of the whole case; and which it was not necessary specially to advance, and rely on in any previous stage of the proceedings, to enable the party to have the benefit of it. Because, independently of all positive enactments, there must be a period of time after which every latent, or inactive claim to property must be presumed to have been radically defective in its origin, or to have been, in some one way or other completely satisfied. It is asking too much, to require, amidst the mutations of human affairs, and the perishable nature of all things, that the evidences of the right of property should be carefully preserved through a long and indefinite period of time. (g) A presumption of right and of the correctness of a state of things sanctioned by a long series of years is necessary to the peace of society. (h)

The rule, *nullum tempus occurrit regi*, even in favour of the crown in England, has been as to many cases abolished, or overruled. (i) In Maryland, the Lord Proprietary was always held to be bound by the statute of limitations; (j) and the republic, since the revolution, has not only never, in any case, that I know of, claimed an exemption from it; but has expressly subjected her rights to its operation under circumstances where the propriety of doing so might well have been questioned. (k) The republic, in this instance, claims the application of no rule to which she herself is unwilling to submit; (l) and therefore, may well rely upon a presumption which is necessary to the peace of all, and which forms an important and essential principle in every code of jurisprudence.

On behalf of the petitioner it is contended, that the presumption, as urged against him, is deduced from the state of facts ordinarily existing between individuals, enjoying the common facilities of intercourse, where the creditor is in a condition to demand the payment of his claim, and the debtor is liable to legal coercion for

(g) *Shipbrooke v. Hinchbrook*, 13 Ves. 396.—(h) *Sherman v. Sherman*, 2 Vern. 276; *Prince v. Heylin*, 1 Atk. 494; *Sturt v. Mellish*, 2 Atk. 610; *Smith v. Clay*, 3 Bro. C. C. 639, note; *Hercy v. Dinwoody*, 4 Bro. C. C. 258; *Cholmondeley v. Clinton*, 2 Jac. & Walk. 140; *Stevenson v. Howard*, 3 H. & J. 554; *Hillary v. Waller*, 12 Ves. 265.—(i) *Co. Litt.* 119, n. 1; *Com. Dig.* tit. Prerogative, (D. 86;) *Bac. Abr.* tit. Prerogative, E. 6; 3 *Blac. Com.* 307; *The Attorney-General v. Richards*, 2 Anstr. 615; *Simpson v. Gutteridge*, 1 Mad. Rep. 610; *Roe v. Ireland*, 11 East. 280; *Goodtitle v. Baldwin*, 11 East. 488; *Nimmo v. The Commonwealth*, 4 Hen. & Mun. 70; *The Mayor of Hull v. Horner*, Cowp. 108.—(j) *Kelly v. Greenfield*, 2 H. & McH. 138.—(k) 1818, ch. 90; 1839, ch. 34.—(l) *Cockey v. Smith*, 3 H. & J. 26.

the purpose of satisfying that demand. It is a presumption, that the debt has been paid, arising from the failure to take any steps to obtain the payment. The rule which establishes the presumption, therefore, assumes the fact, that such a state of things existed as would have enabled the creditor to make these efforts, and might have rendered them available to him.

Upon these general principles the petitioner endeavours to shelter himself from the force of the presumption by shewing, that his predecessor, on whom the duty to collect this debt had devolved, was, by the revolutionary struggle of our country, thrown into the midst of a new and extraordinary state of things; that his debtors were cast out as alien enemies, and their property confiscated, or so situated, or so disposed of, that he knew not where to find it, or how to make it available toward the satisfaction of his claim.

The presumption of satisfaction arising from lapse of time, relied on as a defence against this claim, is a deduction from two facts which it assumes to be true; first, that the creditor always had an efficient remedy for the recovery of his debt; and secondly, that there always was property of the debtor, known to the creditor, within reach of his remedy, fully sufficient for the satisfaction of his claim. (*m*) If these facts are shewn to be true the presumption of satisfaction follows as an irresistible deduction from them; because, it cannot be believed, that a creditor who had the power and the means of obtaining satisfaction would so long neglect the recovery of his right.

This creditor complains, that his remedies have been impaired or destroyed by the law of confiscation and forfeiture which were enforced by the state against his debtor; by the war, during which his debtors were alien enemies; and by his debtors being foreigners resident abroad. And in the next place, even supposing his remedies to have been in their nature efficient, and in no way impaired, that he knew of no debts or property of his debtor which could have been brought within reach of those remedies. These are the positions to be examined; and the examination of them will necessarily exhibit the bearing which the positive statute of limitations has upon this case.

By the law of England a person convicted of treason or felony forfeited his estate; and all his property, including debts due to

(*m*) *Hillary v. Waller*, 12 Ves. 266; *Fladong v. Winter*, 19 Ves. 196; *The Mayor of Hull v. Horner*, Cowp. 109.

him, were confiscated and carried into the public treasury. And in like manner when any one died intestate without heirs or next of kin capable of taking after him, his real and personal estate escheated to the lord, or vested in the king, who, necessarily, for the public peace and to prevent confusion, succeeded to the property as a vacant possession. And where in such case the lands were not, according to the feudal system, holden of any intermediate lord, they escheated to the king; and, under his authority, might be sold and the proceeds taken into the public treasury. When property was forfeited, because of the treason or felony of its owner, by the ancient law of England, the creditors, except those who had incumbrances upon the realty, were left quite without remedy; but in Scotland, it was otherwise, there the public took the forfeited estate, subject to all charges upon it. (n) But by the more modern law of England, the creditors of a traitor or felon are paid to the extent of his forfeited property; and for that purpose the king waives his prerogative and authorizes an administrator to be appointed, who is held liable to the creditors, as in all similar cases, so far as the assets will go. (o) And where lands escheat for want of heirs, the lord or the king, takes them subject to all incumbrances and claims for the satisfaction of which they were bound as the assets of the deceased; and where the king succeeds to the personal estate of the deceased, because of his leaving no next of kin, the king takes subject to the claims of the creditors of the deceased; and the personalty is put into the hands of an administrator accordingly. (p)

In Maryland, under the provincial government, the same rules and practice prevailed; as where the deceased had been found upon an inquest to be a *felo de se*, the forfeiture was released for the benefit of his widow and children. And where certain property, on the death of the owner intestate, had escheated for want of heirs, the Lord Proprietary took the estate subject to all claims against the deceased, and his creditors were paid as from such an amount of assets. Relief was obtained in such case by petition

(n) *Bedford v. Coke*, 2 Ves. 117; *Burgess v. Wheate*, 1 Eden, 203; *Cuddon v. Hubert*, 10 Cond. Cha. Rep. 160.—(o) *Megit v. Johnson*, 1 Doug. 542.—(p) *Manning v. Napp*, 1 Salk. 37; *Jones v. Goodchild*, 3 P. Will. 33; *Burgess v. Wheate*, 1 Eden, 177; *Middleton v. Spicer*, 1 Bro. C. C. 202; *Barclay v. Russell*, 3 Ves. 436; 1 Will. Exrs. 259.

to the Lord Proprietary in Council, where the case was regularly heard, investigated, and disposed of as justice required. (*q*)

Hence it appears, that in Maryland as well as in England, where the property of a debtor was in any way, either because of his crimes, or of his death intestate without heirs or next of kin confiscated, escheated, or taken into the public treasury, his creditors were always paid; and that they were not left without remedy for the recovery of their claims. I am aware, that, from the language used in such cases, the relief appears to have been granted as a matter of grace; but it was a favour so imperiously dictated by the public opinion of the age, and the irresistible justice of the claims of creditors, that what thus appears to have been glossed over as a courtesy was, in truth, well understood, long before our revolution, to have ripened into law and right; although no compulsion, under such circumstances, could have been used against the province any more than against the state now.

It is obvious, therefore, that if the property of the *Mollisons* had been taken into the treasury, according to the law as in force and practice when the debt became due, and before the passage of the confiscation acts, *Hepburn* would have had a well established and effectual remedy for the recovery of his claim; a remedy of which he would have been bound to take notice, and one substantially similar to, and altogether as effectual as that given him against the administrator of his deceased debtor; because in such case the state would have taken upon itself to stand as the administrator for the benefit of creditors of the property of the debtor whose estate it held. But it having been declared, that there ought to be no forfeiture, except only on attainder of murder or treason; (*r*) and provided by law, that no conviction should work a corruption of blood or forfeiture of estate. (*s*) The whole of this learning in relation to confiscation may be regarded as now; and, it is to be hoped, forever entirely obsolete.

The first of our revolutionary confiscation acts, as appears by the marginal notes to most of the acts of the same session, was

(*q*) Robert Fuller's case, 14 May, 1680, *Land Records*, lib. C. B. 45; John Webster's case, 27 November, 1680, *Land Records*, lib. C. B. 60, 102; Richard Russell's case, 7 May, 1681, *Land Records*, lib. C. B. 96, 144, 150, and 166.—(*r*) Decla. of Rights, art. 4. Peter Shuman having been convicted of treason, and executed in the year 1781, the General Assembly released the right of the state to his real and personal estate, and vested the whole in his widow and eleven children, 1796, ch. 15.—(*s*) 1809, ch. 138, s. 10.

not passed until the second day of February, 1781, although it is referred to as October, 1780, ch. 45. The enactments upon this subject are numerous, running through a series of several years, and embracing a great variety of matter. But in regard to this case, they need only to be considered so far as they have a bearing upon the means which, but for them, *Hepburn* would have had, or which they gave him of recovering his claim due from the *Mollisons*. That they changed his remedies, in some respects, is clear; but did they not give him others as effectual as those which they virtually destroyed? And did they place in obscurity, or remove beyond his reach, any part of the estate of his debtors against which he might before have had recourse? These are the only questions.

It is admitted on all hands, that the *Mollisons*, who were then living, were not brought within the scope of those laws, as traitors; and therefore, none of their provisions which relate peculiarly to forfeitures for treason, or to escheated estates, apply to their case. They and their property were affected by those laws only and exclusively as being then British subjects and alien enemies.

By the act of October, 1780, ch. 45, it is declared, that all the property within this state, *debts only excepted*, belonging to British subjects, such as the *Mollisons* then were, should be confiscated. But it was also declared, by the same act, that all citizens of this state, such as *Hepburn* then was, should be fully paid and indemnified, so far as their British debtors were solvent, out of the property confiscated; to be adjusted by the General Assembly: *Provided*, such British debtors had not debts due to them within this state sufficient to satisfy their creditors. Thus requiring the creditors to exhaust that fund first before they made claim against the confiscated property taken into the treasury. Commissioners were appointed to preserve the property so confiscated, (*t*) who were authorized to receive claims and report to the treasurer as to the probable amount due to creditors from persons whose property had been confiscated; and the treasurer was directed to reserve a sufficiency to meet such claims until the General Assembly should take order therein. (*u*)

The time for bringing in claims against the state, which arose on any account before the tenth of January, 1785, was limited to

(*t*) October, 1780, ch. 49.—(*u*) May, 1781, ch. 23, s. 19.

a specified period; (*w*) and it was declared, that all claims against the state on account of property confiscated, which arose before the time limited by law for bringing them in, might be brought in, passed, and settled by the Auditor-General on or before the first day of September, 1787, and when so settled should be paid as directed by law: *Provided*, that the claimant satisfied the Auditor-General, that for want of notice, or for some unavoidable impediment, he could not bring in his claim within the time limited by law. (*x*) And it was further declared, that no such claim should be passed unless satisfactory proof was given that there were no debts due in the country to the persons whose property had been confiscated, to satisfy the claim exhibited against the state, and that due industry had been used by the claimant to discover the debts subject to attachment, and the proper means taken by him to secure his claim out of such debts. And in conclusion it was directed, that the Auditor-General should give notice of this act in such manner as he might think proper to communicate its contents throughout the state. (*y*) It was also provided, that when any claim of a creditor against confiscated property should be rejected by the Auditor-General, the claimant might lay his papers before the Chancellor, who was authorized to make up an issue upon the case, and send it for trial before a jury. (*z*) And, as if to leave the door wide open for any citizen to come in and obtain a judicial decision upon a claim of any kind which he might have against the state, any claimant was allowed, in the manner prescribed, to commence and prosecute an action at law against the state; (*a*) which law remained in force until within a short time past. (*b*)

The confiscation acts divested the *Mollisons* of all their property, debts only excepted, upon the ground that they were alien enemies; and, consequently, those very acts, as to all such property, virtually declared them to be civilly dead. The question then arises, how far did those laws really impede or embarrass *Hepburn* in the collection of his debt? It must be admitted, that but for the confiscation of the property of the *Mollisons*, *Hepburn* might, by an attachment, have taken any part of it, real or personal, as well as their debts, in satisfaction of his claim. But the

(*w*) 1784, ch. 45, and 1785, ch. 10.—(*x*) 1786, ch. 18.—(*y*) 1786, ch. 18; Journ. Cong. 23d July, 1787; 27th August, 1786.—(*z*) 1786, ch. 49, s. 4.—(*a*) 1786, ch. 53.—(*b*) 1820, ch. 210.

confiscation acts allowed him to come in and have his claim passed by the commissioners, or the Auditor-General; and so far, therefore, his remedy was changed without being impaired.

In regard to this change of remedies, it is evident that the confiscation acts considered the *Mollisons* as deceased debtors, and the state as their trustee for the benefit of their creditors, citizens of this country; and as administering their assets according to the principles of equity. Upon a creditor's bill, in this court, all the assets of the deceased debtor are made subject to the payment of his debts, so that the personalty, or natural fund may, at the instance and for the benefit of the heirs and devisees, be first applied. And all his creditors are called in, by a general notice; and their claims, on being proved and adjusted, are ordered to be paid from the proceeds of the sale of the estate. If any claims are not brought in before a distribution is actually made, they are excluded from any satisfaction in that case. Such is the course of administering the estate of a deceased debtor in Chancery. (c) The course of proceeding prescribed by the confiscation acts, is strikingly analogous to it; those acts requiring that the creditors should endeavour first to obtain satisfaction from the debts due to their debtor in this state; and on there being no such debts, that their claims against the property taken by the state, should be exhibited within a limited time, or be excluded; and should be legally proved, if required, to the satisfaction of a jury.

Considering the actual situation of the *Mollisons*, and the whole subject in this point of view, it is manifest that *Hepburn's* remedy for the recovery of his debt, was in no manner whatever materially impaired or obstructed; that although in some respects different, it was as effectual as ever it had been; and although changed, it was altered not merely by one public act of Assembly, of which every one was bound to take notice; but by a whole system of public acts altogether in affirmance of the ancient pre-existing principles of confiscation as regards debtor and creditor; and of a character so important and interesting to the people at large, that *Hepburn* could not fail to have been actually well acquainted with them and all their provisions involving his interests.

Looking to those remedies, by some of which *Hepburn* might certainly have obtained payment of his claim against the *Mollisons*, if it had not been previously satisfied; I might here safely

(c) *Hammond v. Hammond*, 2 Bland, 307; *Tessier v. Wyse*, ante 28.

rest the rejection of it upon this peculiar act of limitation, by which it was in the clearest terms designated, and finally excluded as a claim against the state on account of property confiscated, which had not been brought in and passed by the Auditor-General, on or before the first day of September, 1787. (*d*) But, as it is fit that the whole ground upon which the state rests its defence against this claim, should be fully laid open, I shall proceed.

It is clear then, that this creditor lost nothing by the operation of the confiscation acts; they placed none of the funds of his debtors beyond his reach; nor did they leave him without the most effectual remedies by which he might have made those funds available. And consequently, nothing can be found in those acts, that will afford the slightest protection to his claim against the full force of the presumption of satisfaction, arising from the great lapse of time since it became due. But suppose no such confiscation acts had been passed, then the *Mollisons* must be considered, prior to the 4th of July, 1776, as British merchants resident beyond the jurisdiction of this state; after that time, until the peace of 1783, as alien enemies; (*e*) and thenceforward as alien friends resident abroad; who during all that time had property within the jurisdiction of this state. Then it may be asked, would *Hepburn* have been without remedy, or would any of his legal remedies for the recovery of his debt have been impaired or destroyed by the intervening war or other circumstances?

The case of a debtor resident abroad, who has property remaining in the country of his creditor, is a common one, which must frequently occur every where; and a code of laws, that gave no adequate remedy to the creditor, in such case, would be mainly defective. The name of the process, or the form of the proceeding, is of no importance, so that relief can be obtained by it. In the English books the London foreign attachment is said to be a mode whereby the goods and debts of a foreigner in some liberty may be taken to satisfy his creditors within such liberty. (*f*) And outlawry in civil actions is considered as in nature of civil process to compel an appearance to the suit; or after judgment to procure satisfaction. The forfeiture, though nominally to the king, in truth goes to the plaintiff towards payment of his demand. If the outlaw appears, pays all the costs, puts in sufficient bail, and does

(*d*) 1786, ch. 18.—(*e*) *Barclay v. Russell*, 3 Ves. 433.—(*f*) *Jacobs' Law Dict.* v. Foreign Attachment.

every thing he can to put the plaintiff in as good a condition as he would have been in originally; or if after judgment the outlaw pays the debt and costs, the court reverses the outlawry upon motion without any writ of error. (g) These are the special and general modes of proceeding, according to the English law. And it is now settled, that a creditor may, in cases falling within the jurisdiction of the admiralty, proceed to obtain satisfaction from his debtor resident abroad, by attaching his property in this country. (h)

The mode of proceeding by attachment to obtain satisfaction from property found here belonging to a non-resident debtor, was certainly established in Maryland as early as 1647, if not before. (i) The acts of Assembly in relation to it have been always considered as laws regulating process for the more effectual recovery of debts, or as providing a special auxiliary remedy for the recovery of debts. (j) An attachment has always been considered, from its very nature, as intended solely for the benefit of our citizens; before the revolution a person not an *inhabitant* of the province could not sue out the process; nor can an alien now have it; (k) though an inhabitant of this or any other state or territory of the Union may sue it out. (l) It is intended to enforce the payment of debts only; it will therefore lie on a judgment, bond, note, account, or the like; but not on a covenant, bond with collateral condition, for trespass, &c. (m) It may be levied on any lands and tenements, goods and chattels, rights and credits of the defendant, that can be found in or out of the hands of others, or in the plaintiff's own hands; or it may be levied on an equitable interest in real estate; (n) on a vested interest in any property; on a debt due by judgment; (o) on a debt before it is due; or on any thing that may be taken in execution. (p) And in general, the garnishee may plead all things in defence that the defendant might have pleaded. (q)

One of the most accomplished of the lawyers of Maryland, be-

(g) *Rex v. Wilkes*, 4 Burr, 2549; *Morley v. Stroinbom*, 3 Bos. and Pul. 251; *Tidd Prac.* 109, 135; *Davis v. Davis*, 2 Atk. 23; *Edgell v. Haywood*, 3 Atk. 356.—
 (h) *Manro v. Almeida*, 10 Wheat. 473.—(i) *Campbell v. Morris*, 3 H. & McH. 555.—(j) *Campbell v. Morris*, 3 H. & McH. 555; *Davidson v. Beatty*, 3 H. & McH. 616; *Barney v. Patterson*, 6 H. & J. 201.—(k) *Burk v. M'Clain*, 1 H. & McH. 236; *Yerby v. Lackland*, 6 H. & J. 453.—(l) 1825, ch. 114.—(m) *The State v. Beall*, 3 H. & McH. 347.—(n) *Campbell v. Morris*, 3 H. & McH. 537.—(o) Or now by decree, 1831, ch. 321.—(p) *Wells v. Gheselin*, 1 H. & McH. 91; 1832, ch. 307.—(q) *Masters v. Lewis*, 1 Ld. Raym. 56; *M'Daniel v. Hughes*, 3 East. 367; *Chase v. Manhardt*, 1 Bland, 341.

fore the revolution, gave it as his opinion, which has been virtually sustained by adjudications subsequent thereto, that under the provincial government, and of course since, the property of British merchants here has been, and is understood to be a *depositum* or peculiar security for the payment of country creditors; to the extent therefore of such property credit is given here without inquiry into the circumstances of the merchant elsewhere; and on these considerations our attachment *act and practice* have been founded; thus intimating, as the fact is, that the proceeding by attachment is founded as well upon the *custom* of the country as upon legislative enactments. (r)

Hence it appears, that this creditor might have obtained satisfaction from the property of the *Mollisons* in Maryland, by attachment; that it was his only remedy; and one which had been most emphatically framed to suit such cases as his, and was eminently calculated to afford the most effectual relief to country creditors against British debtors.

There can be no doubt, that *Hepburn* might have proceeded by attachment at any time during peace; but it is said, that the revolutionary war had commenced before this debt became due; and, that, from the 4th of July, 1776, to the peace of 1783, the *Mollisons* were alien enemies. It is now, however, universally admitted, that an alien enemy, resident in the country, may sue and be sued; and further, that the remedies on private contracts for the recovery of debts are not forever barred, but merely suspended by a war between the nations of the creditor and debtor. The only reason why a non-resident alien enemy is not allowed to sue is, that he should not be permitted to recover property and take it out of the country, so as thereby to strengthen the enemy. (s)

But this reason in no way applies to the case of a citizen creditor, suing by attachment to obtain satisfaction from a non-resident alien enemy debtor. In such case, our own citizen by making the property so available to the satisfaction of his own debt, does so far strengthen our own country at the expense of the enemy. (t) The disability of an alien enemy to sue is so extended as to prevent him from gaining any advantage for himself and his country; and, therefore, he is not only disabled from suing for the purpose

(r) *Burk v. M'Clain*, 1 H. & McH. 236.—(s) *Vattel*, b. 3, s. 77; *Clarke v. Morey*, 10 John. Rep. 70; *Buchanan v. Curry*, 19 John. Rep. 137.—(t) *Willis v. Pearce*, 6 H. & J. 191, note.

of procuring any immediate relief; but he is not allowed to obtain testimony by a bill of discovery in equity, so as thereby to lay a foundation for obtaining relief elsewhere, that is, by attachment or otherwise from the property of our citizens in the alien's own country or elsewhere. (*u*)

It is clear then, upon principle, that there was nothing in the circumstances of the *Mollisons* having been non-resident alien enemies by which the remedy of their creditor *Hepburn* could have been in any degree affected. *Hepburn* might have proceeded by attachment at any time after his debt became due on the first of April, 1776, except within that short period during which, by the course of the revolution, the courts of justice were closed; and which it was declared should not be considered as a part of the time limited for bringing any action. (*w*)

But apart from the general principles of law in relation to this matter, it appears from the docket entries of the late General Court, that there were several attachments actually laid in the hands of *Mollison's* debtors during the war and before the peace of 1783; and besides, *Hepburn's* right to proceed by attachment against the property of the *Mollisons* here, at the time they were non-resident alien enemies, has been repeatedly recognized and affirmed in express terms by the confiscation acts themselves, already noticed, as well as by those I shall now proceed to consider.

The act of October, 1780, ch. 5, s. 11, is in many respects an enactment of a very unusual and equivocal character. It authorized debtors of British subjects, such as the *Mollisons* then were, upon certain conditions and under certain regulations to pay the debts so due from them into the treasury. And many debts were so paid in accordingly. Upon which it afterwards became the subject of much litigation in the courts of justice, and of long negotiation between the two nations to determine in what light those payments were to be considered as between those debtors and their creditors. It was finally determined, that as between them, such payments into the treasury were not to be deemed a satisfaction of those debts in any way. (*x*) And, in consequence

(*u*) *Daubigny v. Davallon*, 2 Anstr. 463; *Albrecht v. Sussmann*, 2 Ves. & B. 323.—

(*w*) February, 1777, ch. 15, s. 7.—(*x*) *Dulany v. Wells*, 3 H. & McH. 20; *The State of Georgia v. Brailsford*, 3 Dall. 1; *Ware v. Hylton*, 3 Dall. 199; *The Commonwealth v. Walker*, 1 Hen. & Mun. 144; 4 Secret Jour. Cong. 206; 6 Southern Review, 498.

of that final determination, Maryland, by sundry resolutions, authorized the debtors to withdraw the amounts paid by them, respectively. (y) But all that relates to this view of the subject of this enactment is entirely foreign to the matter now under consideration.

This eleventh section of the act of October, 1780, ch. 5, applied to nothing but the *debts* due to the *Mollisons* from the citizens of Maryland; under which it appears, that some of their debtors actually made payments into the treasury during the year 1781, to the amount of about \$9,000; and the acts of April, 1782, ch. 46, and November, 1782, ch. 18, which, as it would seem, have been erroneously treated as private acts, after reciting that *Thomas Contee* had been the factor and agent of the *Mollisons*, clothes him with full power to collect all debts due to them, for the benefit of their creditors, and to pay into the public treasury the balance by him collected. These special acts were, soon after the peace of 1783, repealed. (z)

But the general law of 1780, as well as these special acts of 1782, without at all affecting any remedy which *Hepburn* had against the *Mollisons'* personalty, or any other portions of their property, did in the most explicit terms preserve, and even improve all his remedies against their debts which were the subject of those enactments. For, it is expressly declared by the general law, that all sums of money so paid into the treasury should be 'liable to the attachment of creditors;' and it is positively provided by the special acts, that nothing therein contained should affect the creditor's right to proceed by attachment. *Hepburn*, as a creditor of the *Mollisons*, could have reached their debts, for the purpose of obtaining satisfaction of his own claim, in no other mode than by an attachment, making their debtors garnishees; and here it is distinctly declared, that the state may, in effect, be made a garnishee under certain circumstances, in place of the debtors. So far then the direction of the remedy was changed; but it was, in fact, thereby much improved; because, it was more easy to ascertain whether the state held any thing, and how much, than any individual who might be summoned as garnishee. (a)

It was declared, that no book, papers, or evidences of debts due to British subjects, such as the *Mollisons* then were, should be

(y) Resol. 1797, No. 14 and 15; Resol. 1798, No. 30; 4 Secret Jour. Cong. 200.—

(z) 1784, ch. 74.—(a) *Ware v. Hylton*, 3 Dall. 268.

taken out of the country ; but, in the absence of a resident citizen agent should be deposited with the treasurer of the state. (b) And it was further provided, that the factors of British creditors should not collect and remit debts due to them until they had lodged with the auditor a list of all balances due to such creditors, and given bond to satisfy the citizen creditors of those British creditors. (c) Thus preserving, for the benefit of citizen creditors, the vouchers, and the funds within their reach so as to enable them to levy their attachments with more certainty and effect.

From these various views of the subject it clearly appears, that all *Hepburn's* remedies for the recovery of the debt he alleges to be due to him from the *Mollisons* were preserved in the most effectual form by the confiscation acts. And, that, supposing those acts out of the question, there was nothing in the war ; or in the circumstances, or situation of the *Mollisons*, that could, in the slightest degree, affect his remedies ; and therefore, there is nothing under which his claim can take shelter from the presumption against it ; unless it may be found in the last position assumed by him ; which is, that there were, in fact, no debts due to the *Mollisons* which he could have attached, or if there were, that he was wholly ignorant of there being any such debts ; and also of the fact of any property of theirs having been actually confiscated and taken into the public treasury.

It appears from the various documents and vouchers produced by the petitioner himself, that the *Mollisons* were English merchants resident in London, engaged very extensively in trade to this country ; that they had, in Maryland, a store at Georgetown, another at Bladensburg, a third at Pamunky, in Charles county, a fourth at Pig point, and a fifth at Huntingtown, in Calvert county ; that they received from various persons in Maryland large consignments of tobacco ; and, amongst others, that this debt now claimed originated in that way ; that their trade was continued to about the year 1775 ; that they had debts due to them, from debtors dispersed over the whole of the then settled portion of the Western Shore of Maryland, to the amount of about £17,000 sterling ; about £13,000 of which is represented to have been due from persons who were solvent at or after the peace ; and that *Samuel C. Hepburn*, the executor of the late creditor, at the time, and for many years after, resided in Prince Georges county, about mid-way between those

(b) October, 1780, ch. 45, s. 10.—(c) 1786, ch. 49.

several stores; and, as it would seem, in the midst of the Maryland debtors of the *Mollisons*.

But it has been urged, that this creditor *Samuel C. Hepburn* had no knowledge of the fact, that any portion of the property of the *Mollisons* had been confiscated and taken into the treasury. The records of the treasury must certainly shew what has been at any time past, received into it from every source as well as from the ordinary one of taxation; they are public and open to the inspection and use of every one at all interested in any fund, that may have been carried into it. And it is a well known historical fact, that the system of the revolutionary confiscation laws, from the time of the passage of the first of them, and for many years after, agitated, interested and engaged the attention of the people of Maryland more intensely than any other set of laws, that ever were passed by their representatives. With regard to the *Mollisons* in particular it appears, in addition to what has been already stated, that a large amount of their property, which had been confiscated, was publicly advertised for sale, and sold at auction on the 20th of October, 1783, and the proceeds paid into the treasury; out of which one of their creditors, it appears, was ordered by the Legislature to be satisfied, on the ground of its being then, 1805, shewn, that there were at that time no debts due to them. (*d*)

From all these circumstances, it is but fair to presume, and I cannot withhold my belief of the fact, that *Samuel C. Hepburn* did know, or might, by any reasonable degree of diligence have informed himself, of an amount of those debts of the *Mollisons* abundantly sufficient to satisfy his claim. But apart from those funds; and if he actually did not know of any of them, and after using due industry, had failed to discover any of them, then he would have so laid that foundation, upon which to claim satisfaction out of the proceeds of the confiscated property of the *Mollisons* which had been taken into the treasury. (*e*) And finally, having failed in every particular; either to shew a want of remedy; or a want of funds, or an ignorance of funds against which his remedy might have been directed, his claim is left exposed to the whole force of the presumption against it arising from lapse of time, by which it is completely covered and extinguished.

Upon the whole then, it is my opinion, in the first place, that there is evidence sufficient to shew, that this claim was actually

(*d*) Resol. 1805, No. 20.—(*e*) 1786, ch. 18.

paid by the *Mollisons* themselves; in the next place, that it has been justly and absolutely barred and excluded by the special act of limitations; (*f*) and in the last place, that the great lapse of time since it became due, without the delay being in any manner reasonably accounted for, gives rise to a presumption, altogether irresistible, that it must have been in some way or other, fully and completely paid and satisfied.

Whereupon it is *Decreed*, that the claim of the said *John M. Hepburn*, as administrator *de bonis non*, of the late *John Hepburn*, against the *State of Maryland*, on account of the confiscated property of *William* and *Robert Mollison*, is utterly unfounded and unjust; and that the petition of the said *John M. Hepburn*, be, and the same is hereby dismissed. And it is further *Ordered*, that the register be, and he is hereby authorized and required to take charge of and safely file and keep among the records of this court all the papers, documents, and vouchers heretofore exhibited or filed in relation to the said claim, subject to the further order of the General Assembly; and to give copies of all or any of the same, and of this decree, on being paid the fees allowed by law in similar cases.

SALMON v. CLAGETT.

A single interrogatory propounded by the defendant to the plaintiff answered by the monosyllable, 'yes.' A motion to dissolve the injunction and exceptions to the answer may be taken up together and determined at the same time. It is necessary in all doubtful cases to advert to the reason of the law. The modes of defence by demurrer, by plea, by answer as called for by the bill, by answer in avoidance, and by matter derived from the whole case as shewn at the hearing considered and explained. A defendant who has omitted, or failed by demurrer or plea to protect himself from making the discovery called for, must answer fully as the bill requires. The modern cases allowing an answer in avoidance to subserve the purposes of a plea overruled.

The difference between the combination of facts which gives rise to the equity upon which the injunction rests, and that which gives rise to the equity upon which the plaintiff asks relief. How an injunction may be obtained; and how it may be dissolved on bill and answer. The answer should, in general, be sworn to; but must be allowed to have full effect, as such, although made by one who is incompetent to give evidence in any case as a witness; or by a defendant who is incapable of making oath.

On discovering, at the hearing, that a party had failed to take some material testimony, the case was, on affidavit, continued, and a commission issued to take the evidence. A person who acquires personal assets by being party to a breach of trust, or *devastavit* by the executor or administrator, may be held liable.

A deed or mortgage given to secure the payment of money cannot be objected to by a party, because of its not having been recorded. What acts of the creditor will discharge a surety. If all the creditor's remedies be expressly reserved, the surety will not be discharged by any act of the creditor. Where a mortgage debt is payable by instalments, the mortgage may be foreclosed when the first instalment becomes due. An injunction granted to protect mortgaged property before the mortgage debt became due.

THIS bill was filed on the 14th day of July, 1828, by *Charles Salmon* against *Elizabeth Clagett, Edmund Clagett, Samuel A. Clagett, John W. Clagett, Thomas Clagett, and Richard H. Clagett*. It is stated and appears, that some time in or before the year 1816, *William Clagett* died intestate, leaving a considerable real and personal estate, and the defendant *Elizabeth* his widow, and the other defendants his children. Soon after the death of the late *William*, his widow, having been appointed his administratrix, took possession of his personal estate, returned an inventory thereof, and settled accounts with the Orphans Court, shewing a surplus to the amount of \$2,753 13; and although a distribution had been ordered by the Orphans Court, yet she had not actually delivered the property or paid any money accordingly to either of the representatives of her intestate; but together with the defendant *Edmund Clagett*, retained the possession of all the deceased's real and personal estate, using and employing it for the common benefit of themselves, and his other legal representatives. That in the summer of 1827, the defendant *Thomas Clagett*, commenced business as a merchant in the city of Baltimore; and to enable him the more advantageously to carry on his trade, the plaintiff *Charles Salmon*, was induced to lend his credit to him upon receiving, as a security against loss, a mortgage from the defendant *Thomas Clagett*, and the other defendants, who are his mother and brothers, the material parts of which deed are expressed in these words:

This Indenture, made this 22d of September, 1827, between *Elizabeth Clagett, Edmund Clagett, Samuel A. Clagett, Richard H. Clagett, John W. Clagett, and Thomas Clagett*, of the one part, and *Charles Salmon* of the other part. 'Whereas, the said *Thomas Clagett*, one of the parties of the first part of this deed, hath lately commenced and intends pursuing the business of a merchant in the city of Baltimore; and whereas, the said *Charles*

Salmon hath agreed to give credit to, and to become surety and endorser on notes drawn by the said *Thomas Clagett* in the prosecution of his said business, to the amount of ten thousand dollars current money; and the said *Elizabeth Clagett, Edmund Clagett, &c.*, to indemnify and save harmless the said *Charles Salmon*, for any advances he may hereafter make, or may have heretofore made for or to the said *Thomas Clagett*; and also for any endorsements which the said *Charles Salmon* may have heretofore, or shall hereafter execute for or on account of the said *Thomas Clagett*, have agreed to execute and deliver these presents.' The deed then proceeds to convey to *Charles Salmon* all the interests of the grantors in a tract of land lying in Anne Arundel county, called Poplar Bottom, of which the late *William Clagett* died seised; and 'also all the right, title and interest which the said *Elizabeth Clagett, Edmund Clagett, &c.*, have in and to the personal estate of which the said *William Clagett* died possessed, consisting of certain negroes, horses and cattle, which said land and personal property is now in the possession and occupation of the said *Elizabeth Clagett* and *Edmund Clagett*.'

And this deed then concludes with a proviso in these words: 'Provided always, and it is the true intent and meaning of these presents, that if the said *Thomas Clagett* shall well and truly pay, repay, and satisfy the said *Charles Salmon* for all advances of goods or loans of money which the said *Charles Salmon* may have heretofore made, or shall before the first day of October, in the year eighteen hundred and thirty, make to the said *Thomas Clagett*, on or before the first day of October, eighteen hundred and thirty, and shall also indemnify and save harmless the said *Charles Salmon* against all endorsements which the said *Charles Salmon* may execute before the said first day of October, in the year eighteen hundred and thirty, and shall also indemnify the said *Charles Salmon* from and against all bills, bonds or notes which the said *Charles Salmon* shall sign or seal as surety for the said *Thomas Clagett*, before the said first day of October, in the year eighteen hundred and thirty, the said advances, loans, endorsements and other liabilities which the said *Charles Salmon* shall incur or make on account of the said *Thomas Clagett*, not to exceed, at any one time, the sum of ten thousand dollars current money, then and from thenceforth these presents and every matter and thing therein contained to the contrary in any wise notwithstanding, to be void.'

That before as well as after the execution of this deed, *Salmon* sold to the defendant *Thomas Clagett*, goods to a large amount, for all which he took notes from *Thomas Clagett*; which several notes became due and payable at different times between the 20th of May and the first of September, in the year 1828. And between the first of April and the 9th of May of the same year, *Salmon* lent to *Thomas Clagett* a large amount of money, and in addition to all this, *Salmon* lent his notes, the one of the 12th of March, and the other of the 19th of April, 1828, payable at three months after date, to *Thomas Clagett*; which *Salmon* paid as they became due. Upon which three several grounds, including a debt collected by *Thomas Clagett*, and house-rent due from him, this plaintiff avers, that his claim amounts to \$1,648 34.

That about the first of May, 1828, *Thomas Clagett* stopped payment and failed in his business as a merchant; and therefore, he made and executed a deed, on the 17th of May, 1828, whereby he conveyed to *Henry Readell* and *Daniel Cobb*, the stock of goods and property, of every description, belonging to him in the store then occupied by him in the city of Baltimore, and all debts, sums of money and claims due, owing, payable, or belonging to him; and all books, bills, notes, evidences and vouchers whatever, touching or concerning the same, all which property was particularly described in a certain schedule, or inventory, then in the possession of *Charles Salmon*; to have and to hold the same in trust for the benefit of the creditors of the said *Thomas Clagett*.

That, on the 26th of the same month, an agreement was entered into in the following words: 'We, the undersigned, acting as the representatives of the creditors of *Thomas Clagett* on the one part, and *Charles Salmon* on the other; have agreed and do hereby agree to the following arrangement, and bind our respective principals to comply with and fulfil the same, viz:

'1st. A correct inventory of the goods shall be taken by two persons appointed by each party, at the cost, or such prices as the same have been invoiced at by *Thomas Clagett*; provided they have not been set down at more than the actual cost of the same.

'2d. The books, notes, and other evidences of debt, shall be forthwith put into the hands of *Charles Salmon*, who shall use all due diligence in the collection of the same. All the personal and real property of said *Thomas Clagett*, excepting clothing and watch, shall, in like manner, and in good faith, be put into the hands of said *Charles Salmon*, and valued by disinterested persons, and received by said *Salmon* at such valuation.

‘3d. The said *Salmon* shall receive the goods when invoiced as above at the gross amount of the same, together with all the moneys received on account of debts, notes, or book account, and place the same to the credit of said estate.

‘4th. The said *Salmon* shall be responsible for the legal debts of said *Clagett*, to the amount of \$39,500, including his own claim and borrowed money; and retain a mortgage which he now holds to indemnify him for any deficiency which may exist, after collecting the debts, and taking the goods at their invoiced price, if any deficiency should then appear.

‘5th. One gentleman shall be appointed by each party, to examine every debt, and determine whether it shall be classed as borrowed money or other legal debts, and should they disagree, they shall have power to appoint an umpire whose decision shall be binding.

‘6th. The said *Salmon* shall give his notes severally to the creditors, at nine months without interest, or fifteen months with interest added after nine months, at his discretion, for such portion as they shall decide to be legal debts; and his notes at ninety days with interest for such portion as they shall class as borrowed money.

‘7th. Should the effects of *Thomas Clagett* not realize the aforesaid sum of \$39,500, the said *Salmon* shall not foreclose the mortgage he holds, until after the expiration of two years from this date.

‘8th. After this agreement has been executed by the respective parties to it, it is understood that all responsibilities to and from *Thomas Clagett*, shall be annulled, so far as the persons we severally represent may be concerned. Also, to exonerate the family of *Thomas Clagett* from the payment of such notes as may be signed, or endorsed by them, and held by said *Salmon*, not interfering with or invalidating their liability on the mortgage held by said *Salmon*.

‘It is expressly understood, that nothing contained in this agreement shall, in any manner, affect the mortgage heretofore given by *Thomas Clagett* and his family to indemnify said *Salmon* against certain risks or losses; excepting so far as to delay foreclosing the said mortgage for two years from the date hereof.’

This agreement was signed by ‘*Daniel Cobb, Henry Beadel*, on behalf of the creditors of *Thomas Clagett*,’ and by ‘*P. Baltzell, for Chas. Salmon*,’ and by ‘*Thomas Clagett*.’ By authority of

this agreement *Salmon* took possession of the goods, and proceeded to collect the debts due to *Thomas Clagett*.

The plaintiff further alleges in his bill, that he did not know what number of negroes, horses, and cattle had been conveyed to him by the mortgage; that he had reason to believe and therefore charged, that the defendants, having it in their power, contemplated and designed to sell and dispose of part, or the whole of the said property, with a view to defeat his lien; that a discovery of the specific property intended to be conveyed to him by the mortgage, was necessary and material for the protection of his interest; that a decree for a foreclosure of the mortgage, or a sale of the said property, could not be had before the first of October, 1830, before which time, he was apprehensive that the defendants would sell, dispose of, conceal, or remove the whole, or a part of the said personal property, and thus jeopardize a part of his claim; and that the goods, wares and merchandise, and debts transferred to him by the agreement of the 26th of May, 1828, would be wholly inadequate to the full payment of his claim; and would leave a balance due to him of eight thousand dollars. Upon which he prayed a discovery of the mortgaged property, and for an injunction, prohibiting the defendants from selling, disposing of, removing or concealing the whole, or any part of the personal property of the said *William Clagett*, deceased, until further order of this court.

Whereupon, an injunction was granted as prayed, and issued accordingly.

After all the defendants had answered, they filed and propounded an interrogatory to the plaintiff, asking him whether the original agreement, of the 26th of May, 1828, as exhibited and filed with the answer of *Thomas Clagett* was not the real agreement entered into on the one part by *Salmon* as stated.

3d September, 1828.—BLAND, Chancellor.—Ordered, that the plaintiff *Charles Salmon*, make a full and sufficient answer to the foregoing interrogatory on or before the first day of October next; provided, that a copy of this order, together with a copy of the said interrogatory, be served on him on or before the thirteenth day of the present month.

In obedience to which the plaintiff, by his solicitor, said, 'the complainant answers to the foregoing interrogatory, yes.' This answer was received without objection.

The plaintiff excepted to the sufficiency of the answers of the defendants; first, because they had not discovered and set forth the number, nature, and kind of the personal property included in and conveyed by the mortgage. And in the next place, because they neither denied, nor admitted the allegations of the bill, that the personal property so mortgaged remained in the possession of the defendants *Elizabeth* and *Edmund*, and was used for the common benefit of themselves and the other defendants.

The defendants having given notice of their motion to dissolve the injunction; the hearing of the exceptions to the answer, and of the motion to dissolve were brought on and argued together.

8th November, 1828.—BLAND, *Chancellor*.—The motion to dissolve the injunction standing ready for hearing the solicitors of the parties were heard and the proceedings read and considered.

The defendants by their answers, all admit the execution of the mortgage, but they say, that it is utterly invalid, as regards the personal estate; because it purports to be a pledge or lien given by an administratrix of personal property which she held only as such; and could not lawfully mortgage for any such purpose. But, supposing the mortgage to have been valid, in its origin; then, they say, that certain claims and property were transferred and delivered over to the plaintiff, from which he has, or might have obtained full satisfaction of his claim; and therefore, that the mortgage is satisfied; or, if it be neither wholly invalid, nor satisfied, then it has been released and discharged; because, by the agreement of the 26th of May, 1828, the terms of the mortgage contract have been so altered, to the prejudice of those of the mortgagors, who were the mere sureties of the defendant *Thomas Clagett*, as to have annulled it altogether; and further, the defendant *Richard H. Clagett*, in his answer, avers and relies upon the fact as a defence, that he was an infant at the time the mortgage was executed by him.

The defendants' motion to dissolve the injunction, being called up to be heard, the plaintiff, on coming in to shew cause, proposed, at the same time, to shew, as cause why the injunction should not be dissolved, the validity of his exceptions; and to have them considered and decided upon, together with the motion to dissolve. The defendants objected to this course, on the ground, that there was not, in every instance, nor in this, a neces-

sary connection between the motion to dissolve, and exceptions to the answers. (a)

It is, in general, true, that if the answer is in any respect insufficient, the injunction cannot be dissolved on the motion which the defendant has a right to make on filing it. Yet, an answer may be only exceptionable in those parts which are not, necessarily, connected with so much of the case as gives rise to the equity upon which the injunction rests; and therefore, as in such cases, a decision upon the motion does not involve a consideration of the other defective and exceptionable portions of the answer; exceptions to those parts of it may, without needless repetitions of the same argument, be separately considered and determined. But it has always seemed to me, that a defendant, who had manifestly omitted to answer, or had answered evasively any substantial part of the bill, not blended with that which peculiarly related to the grounds of the injunction, would come with a very ill grace to ask for its dissolution. The court expects from every one, seeking relief, unreserved frankness; and he who evidently and purposely holds back something cannot complain if he should find himself regarded with suspicion and distrust, and be refused that to which he may, in truth, be entitled; and under other appearances might have obtained.

On a motion to dissolve, on the coming in of the answer, the court is confined absolutely to the bill and answer. The answer, at least so far as it is responsive to the bill, is to be taken for true. No *ex parte* affidavits, or other proofs, are ever admitted at that stage of the case, in support of either the bill or answer. (b) The discussion is confined within a narrow compass, as to facts and circumstances; and neither party can be taken by surprise; because the notice of the motion has given them both time to meet and repel any unfounded objection to their allegations; all of which, upon the hearing of that critical, and often all-important motion, should be found to be such as will stand the test of the closest and severest scrutiny.

But however it may be in the English courts, in this particular, (c) it has long been the practice of this court to hear and decide upon the motion to dissolve, and the exceptions to the

(a) *Doe v. Roe*, 1 Hopkins' Rep. 276.—(b) It has been since provided, that the court may order testimony in reference to the allegations of the bill to be taken, so that it be returned on the day when the motion shall be heard, 1835, ch. 380, s. 8.—(c) *Eden Inj.* 73, 78.

answer at the same time ; (d) and I shall, hereafter, consider it as finally settled here, that the motion to dissolve, and all exceptions to the answer, which may then be filed, shall be taken up and decided upon at the same time ; not, however, denying to the plaintiff the right, for the purpose of obtaining a sufficient answer to the full extent required by the bill, to except to the answer within the proper time, after the motion for a dissolution of the injunction has been disposed of.

On the part of the defendants, it has been urged that although they have admitted the execution of the mortgage, they are entitled to a dissolution of the injunction ; and also to have the exceptions overruled ; because they have fully denied all the equity of the bill, by shewing, that the mortgage was invalid, or had been satisfied, or had been virtually relinquished and abandoned ; or because one of the alleged mortgagors was an infant at the time he executed the deed. These allegations, they maintain, are, in themselves, an ample denial of the equity of the bill, and constitute a sufficient answer to it ; such a one as entitles them to rest their defence upon, by way of answer, without making any farther disclosures ; and also to a dissolution of the injunction.

If these positions are well founded, then indeed the defendants must be allowed all the benefit they claim from them. But although it may be admitted, that these allegations would, at the hearing, if sustained by proof, constitute a complete defence against the pretensions of the plaintiff, yet at this stage of the controversy they present other considerations, and involve principles of a different complexion.

I have never before been called upon to consider these positions ; and on looking into the books, I find the adjudications to have been much more discordant than I had supposed ; and that the principles and rules of practice, in relation to this matter, yet remain to be settled. That we may have a clear and distinct view of the nature and extent of the subject, I shall endeavour, briefly to explain, and illustrate such points and distinctions in regard to the course of proceedings in Chancery as have a bearing upon the matters I am now called upon to decide.

The learning of the law is so chained together, that it can only be well understood in its several parts ; or in any manner safely applied to new cases as they arise, by clearly apprehending and

(d) *Alexander v. Alexander*, 13 December, 1817 ; *Gibson v. Tilton*, 1 Bland, 353.

constantly recurring to its reason. *Ratio est anima legis.* (e) The reason and spirit of cases make law, not the letter of particular precedents. (f) The law does not consist in particular cases; but in general principles which run through the cases and govern the decision of them. (g) All doubtful points are decided by an application of general principles to the particular case. (h) It is the office of an expositor of the law to make such a construction as not only to reconcile the same author with himself; but also to remove all apparent jars and conflicts, that may be found to exist among the various reported judgments upon the same subject, so that all, if possible, may stand together. (i) It is also necessary constantly to bear in mind, that the names of things are for avoiding of confusion diligently to be observed. *Nomina si nescis, perit cognitio rerum. Et nomina si perdas, certé distinctio rerum perditur.* (j) A confusion of terms in any science tends to confound the science itself, by destroying that precision of ideas, that distinction amongst objects, which is the very groundwork of all knowledge. Therefore, without considering the weight of names, I shall look to the reasons given for the several judgments it may become necessary for me to notice and examine. (k)

A plaintiff should, in his bill, set forth, in a brief, but clear manner, all the facts and circumstances out of which those principles of equity arise, upon which he asks relief; or, as I have said, upon a former occasion, the plaintiff's case, as stated by himself, must, in substance, or in some essential bearing, have such a character as will confer jurisdiction on a Court of Chancery; it must appear to be an equitable, as contradistinguished from a mere legal cause of suit. The bill must itself shew why it was necessary, or allowable for the plaintiff to leave the ordinary legal tribunal and come into a Court of Chancery for relief. (l) For, the justice of the republic is distributed, by the constitution, into particular courts, which should not be confounded. (m) The bill may assert, that such and such principles of equity arise out of the facts stated, which entitle the plaintiff to relief; but it is for the court alone to determine how far they are applicable or correct. The case of the plaintiff, then consists merely of facts, *ex facto oritur jus*. Consequently the bill calls on the defendant to speak

(e) Co. Litt. 394.—(f) *Fisher v. Prince*, 3 Burr, 1364.—(g) *Rust v. Cooper*, Cowp. 632.—(h) *Silk v. Prime*, 1 Bro. C. C. 138.—(i) The case of *Fines*, 3 Co. 84.—(j) Co. Litt. 86, b.—(k) *Doe v. Lancashire*, 5 T. R. 62.—(l) *Estep v. Watkins*, 1 Bland, 489.—(m) *Brown v. Bradshaw*, Prec. Cha. 156; 4 Inst. 71.

of, and about facts; thus, if the bill states facts which amount to constructive notice, it is not enough for the defendant to deny notice, he must answer to the facts which constitute the notice. (*n*)

A defendant who comes into court; and, in any manner, meets and opposes, or admits the complaint made against him, may be said to answer it. If he demurs to the bill, he admits the facts; but avers, that none of those principles, for which the plaintiff contends, do so arise from them as to entitle him to relief; and thus the complaint is answered. If the defendant by way of plea, says he has paid the debt claimed by the plaintiff; and asserts that fact as his defence; he gives a legal answer to the complaint. But the bill itself calls upon the defendant to speak to facts, and a mere denial of facts is proper for such an answer, but not for a plea. (*o*)

It is therefore perfectly evident, that neither a demurrer, nor a plea is that sort of answer which the bill requires; because, they neither of them say one word about the matter of fact stated in the bill, or speak of them in the manner they are there treated. The demurrer takes them for true, and answers, by averring, that they constitute no ground for relief. A plea in equity, like a special plea at law, most usually admits, or rather supposes, all that is set forth in the bill to be true; (*p*) but states other facts which produce an equity, which displaces that arising from the facts stated by the bill; or, the plea, an incongruous kind of one, affirms the validity of that, as a release or the like, the dissolution of which is sought, denying the circumstances upon which its legality is impeached by the bill. (*q*) A plea demands the judgment of

(*n*) *Jerrard v. Saunders*, 2 Ves., jun., 187.—(*o*) *Milligan v. Milledge*, 3 Cran. 220. As to this matter, see *Wagram on Discovery*, 8, &c.—(*p*) *Plunket v. Penson*, 2 Atk. 51; *Roche v. Morgell*, 2 Scho. & Lefr. 727; *Tompkins v. Ashby*, 22 Com. Law Rep. 239.—(*q*) *Bayley v. Adams*, 6 Ves. 594.

BISSETT v. BISSETT.—This bill, filed on the 2d of January, 1761, sets forth, that the plaintiff Ann Bissett, as devisee of her first husband, was seised in fee of a certain tract of land in Baltimore county; that she married David Bissett, her second husband, who by repeated beatings, threats, and much ill usage, induced her to convey her lands to a certain John Matthews, and afterwards, for greater security, to a certain Robert Stokes, for the purpose of being conveyed to and vested in her said husband David Bissett, which they did accordingly; that David Bissett is dead; and that her acknowledgments of the said deeds upon what purports to be her private examination, was fraudulently obtained by force, &c. Upon which she prayed, that the deeds might be set aside; and that the land might be re-conveyed to her, &c.

The defendant, who, it appears, was an attorney at law, and the brother and heir at law of David Bissett, deceased, appeared in proper person at September term, 1761, and filed the following plea and answer.

the court in the first instance, whether the special matter urged by it, did not debar the plaintiff from his title to that answer which

The plea and answer of James Bissett, of Baltimore county, attorney at law, to the bill of complaint of Ann Bissett complainant.

The defendant by protestation, not confessing or acknowledging all, or any of the matters and things in the complainant's said bill of complaint contained to be true, in such manner and form as the same are therein alleged and set forth, except in so far as after admitted and acknowledged in the particular answer inserted; as to so much of the said bill of complaint as prays relief, in this honourable court, against the several deeds for conveying the lands in said bill of complaint, and after recited as fraudulently, or unfairly obtained, executed and acknowledged; and extorted by duress without any consideration paid, or if paid, immediately returned. This defendant pleads thereto, and for plea saith; that David Bissett, deceased, and the said Ann Bissett, the complainant, his wife, by their deed of lease, executed by them and dated the fourteenth day of June, A. D. seventeen hundred and fifty-five, for the consideration of five shillings sterling, paid them, did grant, bargain and sell to John Matthews, of Baltimore county, gent. all the several tracts or parcells of land some time in the possession of John Atkinson, deceased, first husband to the said complainant; and which by his last will and testament, duly proved and recorded, he devised to the said Ann Bissett, the complainant, in fee, situate, lying and being in Baltimore county, on or near Bush river and Rumney creek, and called severally by the following names, viz: Broad Neck, Clement, and Clement's Den; and by a resurvey thereon made by the said John Atkinson, in his life-time, collectively called, Atkinson's Purchase, also Dogwood Ridge, Parker's Folly, Parker's Choice, The Marsh, and ten acres of Natty's Island, which had been lately resurveyed, in the name of the said Ann, the complainant, and collectively called by the name of Rumney Marsh, containing eleven hundred and eighty-four acres of land, less or more; and the reversion and reversions, remainder and remainders; issues and profits of the same; to have and to hold the said tracts or parcells of land unto the said John Matthews, his executors, administrators and assigns, from the day next before the date of the said lease for one whole year ensuing, yielding and paying therefor, to the said David Bissett and Ann his wife, the complainant, the rent of one ear of Indian corn, at the end of the said term, if demanded; to the intent, that by virtue of the said lease, and the statute for transferring uses into possession, the said John Matthews might be in the actual possession, and thereby enabled to accept a grant and release of the reversion and inheritance thereof to him and his heirs and assigns forever. Which deed of lease was signed, sealed and delivered by the parties in presence of Samuel Howard and Thomas Newlands, bears endorsed a receipt of the consideration money, witness Samuel Howard, with a certificate bearing date the twelfth of November, seventeen hundred and fifty-five, by Robert Adair and John Hall, justices of the peace, of the parties having regularly acknowledged the said lease and instrument of writing to be their act and deed; and is, with said certificate of acknowledgment regularly recorded as the said certificate thereof, endorsed signed by the clerk; also bears, that upon the sixteenth day of June, A. D. seventeen hundred and fifty-five, the said David Bissett, deceased, and Ann his wife, the said complainant, by their deed of release, for the consideration of five hundred pounds sterling money, acknowledged in the said deed of release to be paid them, did grant, bargain, sell, alien, release, enfeoff and confirm unto the said John Matthews, in his own actual possession then being by virtue of the above lease, and also by virtue of the statute for transferring uses into possession, all the above mentioned tracts or parcells of land therein, and above particularly recited, and the

the bill required. (r) Recollecting, however, that a plea or demurrer only *supposes* the facts to be true, for that purpose; they

reversion and reversions, remainder and remainders, rents, issues and profits of the premises, and of every part and parcell thereof; and all the estate, right, title, use, trust, property, claim and demand whatever of them the said David Bissett, deceased, and Ann his wife, the said complainant, or either of them, of, in and to the premises aforesaid, or any part or parcell thereof: To have and to hold the premises unto the said John Matthews and his heirs and assigns, to the use and behoof of him the said John Matthews, and his heirs and assigns forever; which deed of release is signed, sealed and delivered by the said parties, date aforesaid, in presence of William Dallam and Aquila Nelson, bears a receipt of the consideration money, endorsed of the same date, witness said William Dallam; and a certificate by Col. John Hall, one of the right honourable, the Lord Proprietaries justices of the Provincial Court, of the parties acknowledgment of the said instrument of writing, as their act and deed, and of the said Ann Bissett's private examination, in the terms of the act of Assembly, in that case made and provided; in these words; Maryland, to wit; on the seventeenth day of June, Anno Christ: seventeen hundred and fifty-five, came before me John Hall, one of his Lordships, the right honourable the Lord Proprietary's justices of the Provincial Court, the within David Bissett and Ann his wife, and severally acknowledged the within writing to be their act and deed, and the lands and premises within mentioned with their appurtenances to be the right and estate of the within named John Matthews, his heirs and assigns forever, according to the true intent and meaning of the same writing; and the said Ann being by me examined privately and out of the hearing of her said husband did privately and out of his hearing declare that she made the above acknowledgment willingly and freely and without being induced thereto by fear or threats of, or ill usage of her husband, or fear of his displeasure, signed, John Hall. That the said deed of release bears a receipt of the alienation fine, bearing date the seventh day of August, A. D. seventeen hundred and fifty-five, exceeding by twenty days the alienation fine is appointed to be paid under the penalty of the alienations being void by the condition of the original grant by the Lord Proprietary inserted in every patent; (1674, ch. 2, s. 7,) and the above certificate of the acknowledgment and private examination as also the said deed of release are both regularly recorded, and the clerk's certificate thereof endorsed on the said deed of release. That the said David Bissett, deceased, being diffident of the voiding and nullity in the original patent conditioned and contained, in regard the time appointed thereby for paying the alienation fine, had elapsed by twenty days as above set forth; and not through any diffidence or dread of any illegality arising through the method of procuring the said deed, or in the mode and term of conveyance, as alleged in the said bill of complaint, caused, devised and executed on deeds of lease and release by him, and the said Ann his wife, the said complainant, to Robert Stokes in trust, though the condition aforesaid in the original patent contained, reserves only a power of voiding to the Lord Proprietary, in order to secure the speedy payment of the alienation fine, which is parted from and disclaimed by the after payment, acceptance, and receipt of the alienation fine; so that by the after payment, though twenty days after the provided time of payment, the first deeds were absolutely good and valid in law as the person could, or can impugn or quarrell their validity, under the consideration in the original patent, and lapse aforesaid, by which deeds of lease and release, the said David

do not, like an answer, admit them to be true, any more than a witness who declines to answer a question, can be held to admit

Bissett, deceased, and Ann his wife, the said complainant, for a valuable consideration in law, conveyed the right, property, inheritance, and fee simple of the above directed lands to the aforesaid Robert Stokes, and his heirs and assigns forever; as the lease for one year so as to give the possession duly signed, sealed and delivered upon the twenty-eighth day of November, A. D. seventeen hundred and fifty-five, in presence of William Dallam and John Matthews, more fully bears; which lease bears endorsed a receipt of five shillings sterling as the consideration money therein mentioned, witness William Dallam, and a certificate of the acknowledgment and private examination of the said Ann Bissett, in these words; Baltimore county, December the second, seventeen hundred and fifty-five, came before us the subscribers, two of his Lordship's justices of the peace for Baltimore county, the within named David Bissett and Ann his wife, and Robert Stokes, and the said David Bissett and Ann his wife, severally acknowledged the within instrument of writing to be their act and deed, and the lands and premises therein mentioned, with their appurtenances, to be the right and estate of the within mentioned Robert Stokes, his heirs and assigns forever, according to the true intent and meaning of the same writing; and the said Ann being by us examined privately, out of the hearing of her said husband, and privately and out of his hearing declare, that she made the above acknowledgment willingly and freely, and without being induced thereto by fears, or threats of, or ill usage by her said husband, or through fear of his displeasure, signed, William Smith, John Hall. And bears also the clerk's receipt, endorsed, certifying the whole to be regularly recorded; and which deed of release is signed, sealed, and delivered by the said parties, the twenty-ninth day of November, A. D. seventeen hundred and fifty-five, in presence of William Dallam and John Matthews, bears endorsed, of the same date, a receipt of five hundred pounds sterling, as the consideration money therein mentioned, witness, William Dallam; and a certificate of the acknowledgment and private examination of the said Ann Bissett, the complainant, in these words; Baltimore county, on the second day of December, A. D. seventeen hundred and fifty-five; came before us, the subscribers, two of his Lordship's justices of the peace for Baltimore county, the within named David Bissett and Ann his wife, and severally acknowledged the within instrument of writing to be their act and deed; and the lands and premises therein mentioned, with their appurtenances, to be the right and estate of the within named Robert Stokes, his heirs and assigns forever, according to the true intent and meaning of the same writing; and the said Ann, being, by us, examined privately out of the hearing of her said husband, declared, that she made the above acknowledgment willingly and freely, and without being induced thereto by fears or threats of, or ill usage from her said husband, or through fear of his displeasure, signed, William Smith, John Hall; bears also a receipt for the alienation fine, dated the sixth day of December, A. D. seventeen hundred and fifty-five; and the clerk's certificate, both endorsed, for the regular recording of the whole; and the said Robert Stokes, by deeds of lease and release, reconveyed the right, property and inheritance, and fee simple of the said several tracts or parcells of land, to the said David Bissett, his heirs and assigns forever; which deeds of lease and release by the said Robert Stokes, are severally regularly executed, acknowledged and recorded, and the alienation fine paid in time, as in the said several deeds of lease and release above recited and mentioned also in the said bill of complaint, relation being had to each of them, and here into court brought, ready to be produced, if called upon, at more length and more fully is contained.

the facts inquired into; and therefore, on a plea, or demurrer the facts so supposed to be true, cannot, in another case, be given in

The said defendant further says, that in the act of Assembly of this province made and past the twenty-sixth day of April, A. D. seventeen hundred and fifteen, entitled an act for quieting possessions, enrolling conveyances, and securing the estates of purchasers, which stands still in force unrepealed, there is the following provision for securing *femes covert* against duress in executing conveyances of their lands; and for securing and assuring purchasers in their purchases of lands belonging to *femes covert* in these words: *provided always*, that if any *feme covert* be named as a grantor in any such writing indented, the same shall not be in force to debar her, or her heirs, except upon her acknowledgment of the same; and the person or persons taking such, her acknowledgment, shall examine her privately out of the hearing of her husband, whether or not she doth make her acknowledgment of the same willingly and freely, and without being induced thereto by fears or threats of or ill usage by her husband, or fear of his displeasure; and that the person or persons so examining her shall, in a note or certificate of the taking the said acknowledgment, certify her examination and acknowledgment thereupon; and that such certificate to be likewise enrolled upon record; in which case, and by such acknowledgment and certificate, *feme coverts* shall be barred and not otherwise. The defendant further says, that the right, property and fee simple of the above tracts of land, devolved upon and were entered into by him the defendant, as eldest lawful brother and heir at law to the said David Bissett, deceased. [*The Chancellor's case, 1 Bland, 608, note.*]

Now therefore this defendant for plea saith, that in virtue of the said reconveyance of lease and release from the said John Matthews, with and under protestation, that he does not disclaim, but reserves a power to hold under and plead the said lease and release from the said Robert Stokes, in the event and not otherwise; that the said conveyance through the said John Matthews should at any time hereafter be voided on account of the said lapse in paying the alienation fine, or any other head, imperfection or informality whatever, he holds the said tracts or parcells of land, that the same, under protestation as aforesaid, is a formal, valid and sufficient conveyance regularly executed, acknowledged and enrolled; that he has all the insurance for his said property that the law can give; and the above particular act of Assembly can assure; and that the said acknowledgments and private examinations taken in the very terms, very words, and spirit of the said act of Assembly is and must by the said act of Assembly be conclusive, and effectually bar the complainant from having the relief prayed for in this court; as otherwise property would be rendered altogether vague and incertain; if no rights that could be devised; nor no act of the Legislature, that could be framed, could assure the same, or effectually bar; but be subject to the review, and of being laid aside, and relief given against it in an inferior court; and therefore, this defendant doth plead the above conveyances, fallen and descended upon him as above, the above acknowledgment and certificate of the private examination regularly enrolled, and the above act of Assembly; prays the assurance given him by the said act; and pleads the same as conclusive, and in bar of the relief prayed for by the said complainant in her said bill of complaint; and prays the judgment of this honourable court thereupon.

And this defendant, not waving his said plea, but wholly relying and insisting thereon; for answer to the residue thereof, particular interrogatories in the said complainant's bill of complaint, or to so much thereof as he, this defendant, is advised is material, or necessary for him to answer, all advantages of exceptions to all and every the uncertainties and insufficiencies of the said complaint now, and at all times saved and reserved, he, this defendant answereth and saith, that he does admit,

evidence as admissions by the defendant like those made in his answer. (s)

It appears then, that the answer called for by the bill, is as to a certain set of facts therein stated, and the defendant is required to

that John Atkinson, deceased, first husband to the complainant, was at the time of his death seised of the several tracts or parcells of land set forth in the said bill; that he made such will or devise of the whole real and personal estate to Ann Bissett the complainant; that in his life-time he did obtain such special warrant of resurvey; that after his death the said complainant obtained such renewment thereof; that the same was resurveyed in consequence thereof; the said vacant land added and the certificate thereof to the Land Office returned; that after such resurvey the said Ann Bissett complainant, intermarried with the said David Bissett, deceased. This defendant further answering, says, that he neither knows, nor has been informed or heard, that David Bissett, after his intermarriage, did use any acts of persuasion, or did beat, threaten, or in any other manner abuse, or use ill the complainant, in order to obtain a conveyance of her lands, or any part of them; so far to the contrary, that he has been informed, that John Matthews, at executing, advised her to take the conveyances to the longest lived of her and her husband; but that she declared the right should be absolute, and in his own person to shew her regard; and that Colonel Hall, at taking the acknowledgment, and examining privately, advised her against it; and that he has been informed by those who were present, that she quarrelled with him thereupon, bid him mind his own business; for, that he had no manner of concern with her's; and that she would do it, advise her against it, who would; or words to that effect. And, that at the acknowledging the last deeds, she told Isaac Risteau's wife, and those present, that she parted with her lands cheerfully; and if she had the world she would give it to her husband. The defendant, further answering admits, that the several deeds mentioned in the said bill of complaint were executed, that the deeds mention a valuable consideration, at least what the law admits to be so, that he sees receipts of the payments endorsed on the deeds; and, that from those he must take his knowledge, as he himself was neither present, nor in the county at the time of executing the same. The defendant further says, that he does admit, that David Bissett died intestate; that as his eldest lawful brother, and heir at law, he entered upon, and holds the said lands; that he has in his possession the deeds of the same; particularly those mentioned in the bill; as also his account and memorandum books, and does not recollect, that he ever in any of them observed any telling or minute of the said consideration money mentioned in the said deeds being marked, or mentioning the same being paid. The defendant further answering says, that he obtained such warrant of resurvey, had the certificate of resurvey returned; and, that the same lies still in the office unpatedented; further says, that the alienation fine, for the six hundred and forty-three acres of vacant land, added, was paid by David Bissett. And lastly, the defendant further answering, says, that he never was requested to resurvey the said lands, as set forth in the said bill of complaint; but says, that, if he had, the complainant would have met with the refusal asserted in the said bill; and therefore, the defendant humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

This plea and answer were signed and sworn to on the 12th day of August, 1761, before a justice of the peace in the usual form.

Chancery Proceedings, lib. D. D. No. J. fol. 60. The plea was allowed and the bill dismissed without costs, 1 H. & McH. 211.

(s) *Tompkin v. Ashby*, 22 Com. Law Rep. 239.

say whether they are true or false; and to set forth all he knows about them; it extends so far and no farther.

The object in calling for an answer is to serve the purposes of the plaintiff, not of the defendant. The plaintiff calls for it as evidence, and it is equivalent to parol evidence, as to all matters where such testimony is available. But, the necessary consequence of this position is, that since the plaintiff has called on the defendant to testify, by way of answer, it is to the full extent of the call, or so far as it is responsive to the bill, competent evidence; which cannot be overturned by the testimony of one witness alone; and the answer so called for is evidence to this extent, although it be made by a defendant deeply interested, or by one who is incompetent as a witness in ordinary cases; or by a corporation aggregate under its seal without oath.

A defendant may allege any facts in his answer, as an avoidance, which give rise to an equity that constitutes a good defence; as payment, a release, &c.; and, however generally or darkly any such matter may be stated, the plaintiff cannot except; because they form no part of that response he had called for; and if such statements are so obscure as to be of no avail, it can be of no injury to him. The defendant alone bears the consequences of the lame and ineffectual manner in which he puts forward his own defence. Facts thus advanced in the answer, by way of avoidance, operate, in many respects, as if they had been couched in the form of a plea; but whether presented in the one form or the other, they are never considered as evidence of any kind; because the plaintiff had not, in any manner, called for them. Hence, if the plaintiff puts in a general replication, the defendant must prove them at the hearing, or they will be disregarded. (*t*) Yet if the plaintiff sets the case down to be heard on bill and answer, or refuses to reply, then such allegations must be received as true; not because they constitute any part of the answer called for by the bill; but, because the plaintiff by setting the case down on bill and answer, or refusing to reply, has precluded the defendant from proving them; and, therefore, by that act he makes a tacit admission of their truth; and they are accordingly received as admissions; (*u*) an infant plaintiff, however, can make no such admissions. (*w*)

(*t*) *Simson v. Hart*, 14 John. 74.—(*u*) *Barker v. Wyld*, 1 Vern. 140; *Grosvenor v. Cartwright*, 2 Cha. Ca. 21; *Wrottesley v. Bendish*, 3 P. Will. 237, n.; *Wright v. Nutt*, 3 Bro. C. C. 339; *Beams' Orders*, 180; *Forum Rom.* 45; *Estep v. Watkins*, 1 Bland, 488.—(*w*) *Legard v. Sheffield*, 2 Atk. 377.

But, apart from those several grounds of defence, which a defendant may set forth, and rely upon in the shape of a demurrer, a plea, an answer responsive to the bill, or an answer in negation or avoidance of it; there may be found at the hearing a substantial defence arising out of the whole case which has not, in any manner, been specially advanced and relied upon by the defendant in his pleadings. A defendant may, in his answer, rely upon lapse of time as a defence against a stale claim. But even if he does so, it will not avail him if the delay is accounted for; because, in such case, although it may be a very old, it cannot be considered as a stale claim. (x) If, however, the claim should, in truth, be a stale one, and the defendant should have been entirely silent, in his pleadings, as to lapse of time; yet he may have the benefit of the presumption of satisfaction arising from the lapse of time at the hearing. (y) Consequently, this reliance upon an unopposed presumption is a mode of defence, which shews itself at the hearing, upon a consideration of the whole case, and not from anything directly alleged by the defendant.

There are then, five modes of defence of which a defendant may avail himself, according to the nature and exigences of his case; 1, a demurrer; 2, a plea; 3, an answer, properly so called; 4, a negation or matter in avoidance, embodied in the shape of an answer; and 5, a defence found at the hearing as the production of the whole case as then presented for adjudication. Each of these modes of defence is strikingly distinguishable from the rest; and it is of importance, that they should, in no manner, nor in any stage of the proceedings be confounded with each other.

It is a general rule, that a defendant who submits to answer must answer as fully as the bill requires. If the defendant after appearance fails to make any answer whatever, then process may be issued against him for the contempt, or the bill may be taken *pro confesso*. If he answers; but does so imperfectly or evasively, then, upon exceptions taken by the plaintiff, he may be made to answer fully. The plaintiff's remedy for an insufficient answer, if he wishes all the material matters of his bill fully answered, is by taking exception, which brings the question before the court; whether the de-

(x) *Clifton v. Haig*, 4 Desau. 341.—(y) *Prince v. Heylin*, 1 Atk. 494; *Sturt v. Melish*, 2 Atk. 610; *Hoare v. Peck*, 9 Cond. Cha. Rep. 165; *Coleman v. Lyne*, 4 Rand. 454; *Prevost v. Gratz*, 6 Wheat. 498; 1 Mad. Chan. Pra. 99; *The Attorney-General v. The Mayor of Exeter*, 4 Cond. Chan. Rep. 208.

defendant has answered as fully as he was required to do by the bill. The determination of that question always involves the preliminary inquiries; whether the plaintiff making the demand has the capacity to make it; and also, whether his case is such a one as gives him any claim to an answer. All the deviations from this rule, that a defendant who submits to answer must answer fully, have sprung from the consideration of this preliminary investigation.

The plaintiff, we have seen, must, by his bill, present such a case as falls properly within the jurisdiction of the court; and, it must also appear, that he has a legal capacity to sue; for his title to sue is a part of his case which he must make out at the hearing. (z) Every bill, therefore, assumes those two propositions. But, if that should not be the case, or either of them should be untrue, it is not indispensably necessary, that the defendant should make the objection by demurrer, by plea, or by relying upon it in his answer. For, although he cannot, after he has answered, have the bill revised and divested of its impertinence; (a) yet an objection to the jurisdiction of the court, or to the capacity of the plaintiff may be presented in any form, or at any time; it may be made by demurrer, plea, or answer, or it may be taken advantage of at the hearing. (b) And so too, at law, a defendant may, on the same grounds, demur, plead, or move in arrest of judgment. (c) It is not said, in any of the English authorities, that a denial of jurisdiction forbids all inquiry into the nature of the case; on the contrary, a clear understanding of it is indispensably necessary, in order to determine, whether it be, in truth, one of which the court has no jurisdiction. And if the fact does not satisfactorily appear from the proceedings then, on a plea, it may be established by proof on the trial of the plea; or upon a full disclosure, and at the hearing. For, certainly, no court of justice, after the fact has been shewn, and made to appear, should compel a defendant to answer, or give relief to a plaintiff as to any matter of which it has no jurisdiction; or where the plaintiff has no legal capacity to demand and receive that which he asks. (d) These are the grounds on which the rule is founded; and, therefore can, in no way, be considered as exceptions to it.

(z) *Newman v. Willis*, 2 Bro. C. C. 147.—(a) *Abergavenny v. Abergavenny*, 2 P. Will. 312; *Anonymous*, 2 Ves. 631.—(b) *Brown v. Bradshaw*, Prec. Cha. 153; *Jennet v. Bishop*, 1 Vern. 181; *Penn v. Baltimore*, 1 Ves. 446; *Roberdeau v. Rous*, 1 Atk. 544.—(c) 1 Chit. Plea. 7 and 127.—(d) *Lempster v. Pomfret*, Amb. 151; *Forum Rom.* 51.

Let it, however, be supposed, that the case shewn by the bill is one of which the court has jurisdiction; and that the plaintiff has a capacity to sue. Even then the plaintiff's inquiries, concerning the case, can only be such as he may lawfully make of the defendant, as being properly a defendant; and supposing him to be interrogated as a mere witness. The plaintiff, in this respect, places the defendant in the condition of a witness; and interrogates him for the purpose of obtaining evidence; or the defendant is thus called upon, as it were, by a *subpœna duces tecum*, and required to bring into court certain documentary evidence. A plaintiff is entitled to have a discovery as to two heads: first, to enable him to obtain a decree, or to bring an action; or to ascertain facts material to the merits of his case; either because he cannot prove them, or in aid of proof, or to save expense; and next he is entitled to a discovery of matters to substantiate his proceedings and make them regular and effectual in this court. (e) But the disclosures, thus called for, must be pertinent and material to the plaintiff's case, and necessary in order to enable him to recover; as where an executor was required to say, whether he had a sufficiency of assets; and to state an account; if he admits a sufficiency of assets to satisfy the plaintiff's claim, he need not answer as to the account. (f)

But, although a man is allowed, voluntarily, to disclose any thing against himself, however atrocious, he shall never be compelled to criminate himself; or even to subject himself to a forfeiture; *nemo tenetur scipsum accusare*, is a maxim of the English code, which, with an evident reference to proceedings in Chancery, has been engrafted into the fundamental law of the republic. The twentieth article of the Declaration of Rights provides, 'that no man ought to be compelled to give evidence against himself, in a court of common law, or in any other court, but in such cases as have been usually practiced in this state, or may hereafter be directed by the legislature.' The sound sense of which is, that a man shall not be obliged to discover what *may* subject him to a penalty, not what *must* only; (g) but the boundaries are often very nice, where a matter is near indictable, and a fraud in this court. (h) If, however, it should in any manner appear by the

(e) *Finch v. Finch*, 2 Ves. 492; *Brereton v. Gamul*, 2 Atk. 241; *Moodalay v. Morton*, 1 Bro. C. C. 469,—(f) *Finch v. Finch*, 2 Ves. 492; *Agar v. The Regents' Canal Co.*, Coop. Rep. 212.—(g) *Harrison v. Southcote*, 1 Atk. 539.—(h) *Chetwynd v. Lindon*, 2 Ves. 450.

proceedings, or be shewn, that the answer would criminate, or subject him to a forfeiture, he cannot be compelled to give it; and this privilege extends not only to the broad and leading fact; but to any fact which may furnish a step in the prosecution; and is likewise so applied as to protect a husband or wife from being compelled so to answer as to criminate the other. (i) And although one may avail himself of this privilege, when he can safely do so, by demurrer, or plea; (j) yet he is under no obligation to take that course, for it may be, that he could not demur; because, that might be to admit the facts to be true. (k) But the claiming of this privilege never creates a defence against relief in this court; therefore, as in case of usury, or forgery, if proof can be made of it, the court will let the case go on to a hearing; but will not force the party, by his own oath, to subject himself to punishment for it. (l)

Again, if the defendant has obtained his knowledge of the facts, concerning which the bill requires him to answer, as an attorney, or solicitor; and, he so avers in his answer, it will be deemed conclusive and sufficient. The policy of the law has established it as the privilege of a client, that no facts which he communicates to his attorney or solicitor as such, shall be disclosed upon any occasion without his permission. The court, before which an attorney or solicitor is called, will not suffer him to divulge the secrets of his client; and therefore, a plaintiff cannot be allowed to draw forth such communications, either by placing the attorney in the situation of a mere witness, or of a defendant to his suit. (m)

Again, if the documentary evidence, called for by the bill, be of a public nature, which the defendant holds as the keeper of such public records, which are open to all, and exemplifications of which may be obtained by any one, on paying the legal fees; and it is not alleged in the bill, that he had hindered any person from searching, or refused copies on payment of his fees, his answer, that he doth not know any thing that is prayed in the bill, but as an officer, will be deemed sufficient. (n)

(i) *Wrottesley v. Bendish*, 3 P. Will. 238; *Cartwright v. Green*, 8 Ves. 405; *Claridge v. Hoare*, 14 Ves. 59; *Parkhurst v. Lowten*, 2 Swan. 214; *McIntyre v. Mancius*, 16 John. 592.—(j) *Bea. Pl. Eq.* 278.—(k) *Honeywood v. Selwin*, 3 Atk. 276.—(l) *Brownsword v. Edwards*, 2 Ves. 216; *Singery v. Attorney-General*, 2 H. & J. 490.—(m) *Wright v. Mayer*, 6 Ves. 281; *Parkhurst v. Lowten*, 2 Swan. 194; *Greenhough v. Gaskill*, 8 Cond. Cha. Rep. 394; *Wilson v. Rastall*, 4 T. R. 753.—(n) *Delove v. Bellaney*, 2 Eq. Ca. Abr. 66.

And again, if the bill makes a mere witness a defendant he need not demur, or plead; but if he answers and disclaims all interest whatever in the matter in controversy his answer is conclusive and sufficient; because, having thereby reduced himself to the condition of a mere disinterested witness, his testimony, if required, may be taken as such. (o)

Now we have seen, that the reason why the defendant may be compelled to answer as the bill requires, is, that the plaintiff is entitled to his evidence, either because he cannot otherwise prove his case, or to save expense. But, no man can be compelled to criminate himself; nor shall any attorney be permitted to divulge the secrets of his client. These are fundamental axioms restrictive of the right to call for testimony in any manner or form whatever. Inquiries, made in violation of these axioms, are unlawful; and consequently, cannot be answered; since the submission of a defendant to answer must be understood to be qualified by restrictions, that are applicable, indiscriminately, to all modes and forms of calling for evidence. The plaintiff has a right to a full answer to save expense. But he cannot be thus indulged in the saving of expense to himself to the injury of another disinterested and innocent person. *Nemo debet locupletari ex alterius incommodo*. A plaintiff shall not be permitted to burthen a keeper of public records with the expense of making out, and producing copies which any one may obtain on paying the legal fees; nor shall a plaintiff be permitted to save expense to himself by making a mere disinterested witness a party and burthening him with the expense incident to that character.

But these allegations can never be advanced in avoidance, or put in issue as a defence; because they create no defence. (p) They are grounded merely on the privilege of the defendant or his client; and on the right of every one to disengage himself at once from a controversy with which he cannot be encumbered as an interested party, either in his public or private capacity; and consequently they are qualifications; but cannot be considered as exceptions from the general rule; since that which must always be, and necessarily is assumed as an admitted proposition, without which a rule cannot be applicable to any case, cannot, with propriety, be considered, as, in any respect, an exception to such rule.

(o) *Richardson v. Hulbert*, 1 Anstr. 65; *Cartwright v. Hateley*, 1 Ves., jun., 292; *Fenton v. Hughes*, 7 Ves. 287.—(p) *Brownsword v. Edwards*, 2 Ves. 246.

The object of the interrogatories of the bill is, lawfully to obtain answers thereto, for the purpose of using them as evidence applicable to a case of which the court has jurisdiction. But these disclosures may be very injurious, or destructive to the interests of the defendant; and he may be able to shew, that, in equity, he is not and ought not to be bound to make any discovery whatever. A plea is exactly calculated for this purpose. Whatever shews there is no right which can be made the foundation of a suit, may constitute the subject of a plea. One of its main objects is to advance such new matter, as has not been shewn or relied on by the plaintiff, as will preclude him from that discovery which he requires by his bill. But, although the plea may advance some new matter, yet it may be, that it only denies some fact affirmed by the plaintiff, and which is so essential to his case, that without establishing its truth he cannot recover. (q) If a plea be overruled generally, the defendant is ordered to answer; or it may be wholly overruled, as a plea, leaving it to stand for an answer, with or without liberty to except; or it may be allowed to operate as a plea, for the purpose of protecting the defendant from some particular discovery, and to stand for an answer with liberty to except as to the rest. (r)

But a plea admits the truth of the facts set forth in the bill, that are not particularly covered and denied by it; and therefore, if the defendant fails to establish the truth of his plea, on issue joined thereon, as to all the discovery sought by the bill, and which the defendant protected himself from making by his plea, the plaintiff is left precisely in the situation of having had his bill taken *pro confesso*. But that may be; and, in many cases, is far from answering his purpose. The disclosure of facts which the defendant alone is capable of making, and of which the plaintiff is unable to adduce any proof, may be essentially or indispensably necessary to enable him to obtain the relief he is in quest of. Consequently, where a discovery is needful to the plaintiff he shall not, under such circumstances, lose the benefit of it; as the court will order the defendant to be examined on interrogatories to supply the defect. (s) For the same purpose, of supplying the defect, in

(q) *Drew v. Drew*, 2 Ves. & Bea. 159.—(r) *Pusey v. Desbouvrie*, 3 P. Will. 321; *Brereton v. Gamul*, 2 Atk. 210; *Child v. Gibson*, 2 Atk. 603; *King v. Holcombe*, 4 Bro. C. C. 439; *Spurrier v. Fitzgerald*, 6 Ves. 548.—(s) *Brownsword v. Edwards*, 2 Ves. 246; *Hawtry v. Trollop*, Nelson, 119; *Miff. Plea*. 249; *Brown v. Wilson*, 4 Hen. and Mun. 481.

cases where the act of Assembly allows the plaintiff to proceed on the default of the defendant, it is provided, that whenever the bill shall charge any matter as being within the private knowledge of the defendant, the plaintiff may, on making affidavit, in open court, that such matter does rest in the private knowledge of the defendant, have the bill, as to such matter, the same being sufficiently alleged, taken *pro confesso*, and have a final decree accordingly. (*t*) But where the relief sought can be obtained without the discovery of any fact by the defendant, the plaintiff may, at once, have a decree, without either interrogating the defendant, or making any affidavit of the truth of the facts alleged in the bill as to which the defendant ought to have answered.

The meaning of a demurrer, or a plea, is to intercept, in an early stage, a cause which must ultimately end in nothing; (*u*) or to prevent a discovery, that may be prejudicial to the defendant. It is, therefore, important, in most cases, that a defendant should not, by any slip or mistake, lose the benefit of his demurrer or plea; or have it snatched from him by any technical nicety. For these reasons, he may be allowed to amend, either his demurrer or plea, so as to make it as effectual as the nature of his case will allow. Where the demurrer is general, to the whole bill; but cannot be thus sustained, the court, after argument, by special leave, has permitted the defendant to demur to part of the bill only; considering it as a kind of amended demurrer; since a demurrer cannot, like a plea, be held good in one part and bad in another; (*w*) or a demurrer may be overruled, without prejudice to the defendant's insisting by way of answer against making a particular discovery, which is, in effect, allowing the demurrer to stand for so much. (*x*) So, too, on shewing what the amendment is, and how the slip happened, leave will be given to amend a plea; or, if it be incapable of amendment, that it may be withdrawn and an entirely new one filed. The court upon this subject exercises a sound discretion, allowing to a defendant reasonable time to put his plea in proper form, so that he may lose no advantage he can derive from presenting his defence in that shape; at the same time taking care, that the plaintiff sustains no material injury by the delay. (*y*)

(*t*) 1820, ch. 161, s. 2.—(*u*) *Freeland v. Johnson*, 2 Anstr. 407.—(*w*) *Baker v. Mellish*, 11 Ves. 68.—(*x*) *Suffolk v. Green*, 1 Atk. 450.—(*y*) *Freeland v. Johnson*, 2 Anstr. 411; *Beam Plea*. Equ. 329.

If the demurrer and the plea be entirely overruled, still the defendant may, in general, advance and rely upon the same matter in his answer; and have the benefit of it at the hearing. (z) But it seems to be settled, that the same matter cannot be so relied upon to protect the defendant from the disclosures prayed by a bill of discovery. (a)

How far such an answer can be made available against the discovery sought by a bill praying relief, is a matter which I shall now inquire into and determine.

We have considered the several ancient modes of defence which a defendant may avail himself of; either for the purpose of intercepting the litigation at an early stage of its progress, or of protecting himself from discovery, or of meeting his opponent upon the merits at the final hearing; and we have seen, with what liberality some of them may be amended so as to answer the purposes for which they were intended. The difficulty, now before us, is one which occurs in a case anterior to the final hearing; and may, after that, re-appear, accompanied with additional embarrassment. It is produced by a *new use* which a defendant attempts to make of one of the ancient modes of defence. A positive negation, or matter of avoidance, embodied in an answer, is admitted to be one of the ancient established modes of defence; and the point is, whether a defendant who has omitted or failed, by a demurrer, or plea, to protect himself from making the discovery required by the bill, shall, in any or what case, be allowed to do so by means of this defence of a negation or matter in avoidance relied upon only by way of answer. Consequently, the question now to be decided is, whether this *new use* can, before the hearing, be made of this ancient mode of defence.

Where the bill sets forth various facts as the constituent parts of that case, which entitles the plaintiff to the relief he asks, it is obvious that if the defendant, by plea, denies and invalidates any material one of them, he breaks up the plaintiff's whole case, and destroys his right to recover. Thus, if the plaintiff avers his right to a share in a certain trade as a partner; and, as such, calls for a discovery and account. The fact of his being a partner is an essentially constituent part of his case; it is the first or principal

(z) *Stephens v. Gaule*, 2 Vern. 701; *Suffolk v. Green*, 1 Atk. 450; *Brownsword v. Edwards*, 2 Ves. 246; *Finch v. Finch*, 2 Ves. 491; *Baker v. Mellish*, 11 Ves. 68.—

(a) *Hoare v. Parker*, 1 Cox, 224.

point to be tried; and if that be denied, and shewn to be untrue, his whole case is broken up, his right destroyed; and therefore, he cannot have the discovery and account he calls for. A plea which denies the fact of partnership, in such case, is called a *negative plea*; and it will protect the defendant from the discovery or account; the right to call for which having been founded upon that which is denied.

Upon a like ground, where a defendant, in his answer, positively denies the fact of partnership, his answer, it is said, must be deemed sufficient; and consequently, that he cannot be compelled to go on and discover and account as required by the bill. This denial in the answer, it is obvious, in this respect, performs the office of a negative plea. It is one of the alleged exceptions to the general rule, that a defendant who submits to answer shall answer fully as the bill requires. This, and all similar negations in answers may be called *negative exceptions*.

Where a defendant, admitting all the facts in the bill to be true, advances and affirms other facts not mentioned in the bill, in the shape of a plea, as an avoidance and bar of the whole claim of the plaintiff; such a plea affords to the defendant a protection from the discovery sought by the bill. As where the plaintiff sets out his right to an estate, and prays a discovery of some particulars respecting the title, and the defendant, by plea, avers, that he is a *bona fide* purchaser for a valuable consideration without notice, he will be protected by such plea from the required discovery. In like manner, if the defendant, by his answer, avers, that he is such a purchaser; it is said, that such matter, so alleged, in his answer, must be deemed a sufficient answer; and allowed to protect him from the discovery called for. This is another of the alleged exceptions to the general rule. It is evidently founded on an averment of a new fact, in avoidance, which might have been made the subject of a plea; and gives a protection from discovery in like manner as such a plea would have done; therefore, this, and others of a similar nature, may be denominated *affirmative exceptions*.

There are various instances in which a defendant has been allowed to take shelter from the discovery sought of him by denying the title or some material fact constituting the title of the plaintiff. A denial of the whole demand has been held to be a sufficient answer, and one which affords protection against the discovery required. (b)

The plaintiff claimed tithes according to a particular *custom*. The custom being denied by the answer, it was held to be sufficient; and to preclude the right to the discovery prayed. (c) A plaintiff claimed as next of kin; the answer denied his being next of kin; and it was considered as sufficient, and a bar to the discovery called for. (d) A plaintiff claimed as a partner; a denial of the partnership, by way of answer, was deemed sufficient, and a bar to the discovery. (e) The plaintiff alleged, that his claim arose from a specified mode of dealing, the answer denied the mode of dealing; and it was held to be sufficient, and a bar to the discovery. (f) These are all the cases, that have fallen under my observation in which the exception was produced by a negation in the defendant's answer.

I have met with two cases, furnishing but one instance of an exception, arising from an averment of some new matter in avoidance; and that is, where the defendant alleged, that he was a purchaser for a valuable consideration without notice. In the first of them, the answer was held to be sufficient, and a bar to the discovery required by the bill. (g)

Such have been the adjudications upon this subject; but, as it is the reason and spirit of cases which make law, and not the letter of particular precedents, we may be permitted to investigate the solidity of the reasons of these decisions. The reports of some of them furnish no reason of any kind; and therefore, I shall not venture to guess at what might have been the reasons on which the judgment of the court was founded.

In the one of these cases in which the plaintiff demanded tithes according to a particular custom, the court is reported to have said, that where there is a full answer given to the thing in demand, till that be tried, the defendant is not obliged to discover; otherwise, any plaintiff might, upon a feigned suggestion, compel a defendant to discover what writings he has, or what goods, or other thing whatsoever, upon pretence, that he is joint-tenant with him; and so what he has gained by his trade, which would be strangely inconvenient. (h) In another of them, where the alleged partnership was denied only in the answer; in reply to the argument, that the defendant could only have protected himself from the discovery by

(c) *Randal v. Head*, Hardr. 188.—(d) *Sweet v. Young*, Amb. 353.—(e) *Hall v. Noyes*, 3 Bro. C. C. 487; *Jacobs v. Goodman*, 2 Cox, 282.—(f) *Donnegal v. Stewart*, 3 Ves. 446.—(g) *Jerrard v. Saunders*, 2 Ves., jun., 458; *Ovey v. Leighton*, 1 Cond. Cha. Rep. 433.—(h) *Randal v. Head*, Hardr. 188.

plea, or demurrer, the judge is made to say, you are not entitled to an account unless there be a partnership; and your position is much too wide; at that rate, if an utter stranger were to file a bill against *Child's shop*, (then a great London banker,) alleging a partnership, it could not be sufficient to deny that any such partnership existed. There may be cases where the court will require an account although the principal point in the bill is denied; but not in a case like this. (*i*) In a third case the plaintiff, after setting out his title, prayed a discovery; the defendant answered, that he was a purchaser without notice; exceptions were taken to the answer, as being insufficient; upon which the Chancellor, among other things, is reported to have said, that this court will never extend its jurisdiction to compel a purchaser, who has fully and in the most precise terms denied all the circumstances, mentioned as circumstances from which notice may be inferred, to go on to make further answer as to all the circumstances of the case, that are to blot and rip up his title. To do so would be to act against the known established principles of the court. (*j*) In one other of these cases some reasons are given; but they are very obscurely expressed; and, perhaps, convey no other idea than the supposed inconvenience to the defendant alleged in some of the other cases in which reasons for the decision are given. (*k*)

Here then, we have before us all the reasons, that have ever been given in favour of these exceptions to the rule. Now, it is perfectly manifest, that in each of these cases the reasons given are based upon an assumption of that, against the plaintiff, and in favour of the defendant, which is the very fact about the truth of which they are at issue. This assumption does, in effect, contrary to the general rules of pleading, treat an answer as being as conclusive as a plea. (*l*) The *custom*, the *partnership*, or the *notice*, was the very fact put in issue between the parties; and therefore, it would seem to be exceedingly rash to pronounce any judgment founded on the truth or falsehood of such fact, before the issue was tried and determined. (*m*) To say, that a party might feign a suggestion to warrant a call for a discovery is tantamount to saying, he might commit a fraud. Either party, any one may commit a fraud; but the law presumes every one to be innocent until the contrary appears; and the court is bound to act upon that presumption.

(*i*) *Jacobs v. Goodman*, 2 Cox, 282.—(*j*) *Jerrard v. Saunders*, 2 Ves., jun., 458.—(*k*) *Sweet v. Young*, Amb. 353.—(*l*) *Cartwright v. Hateley*, 1 Ves., jun., 292.—(*m*) *Wigram on Discovery*, 8.

An allegation of this description, of a defendant in his answer, not being responsive to the bill, cannot be allowed, before a decision, to go for any more than an allegation in the bill; if not proved at the hearing, they will, both of them, be disregarded. The court then, ought not to say, that the defensive negation or affirmation, of the defendant in his answer, should be assumed as true; or as so overthrowing the averments of the bill as to deprive the plaintiff of the discovery he asks.

But these reasonings appear to be founded upon a much broader and more extraordinary assumption; which is, that the defendant has no other means of protecting himself against the most frivolous and unfounded calls for disclosures, that may be attended with the most injurious consequences to him. If there was the least ground for this assumption the reasoning would be entitled to the greatest respect; but it is utterly destitute of foundation. We have seen that a defendant has the most ample means of protecting himself from all unwarrantable calls for discovery, by either a demurrer, or a plea; which he may mature, and advisedly rest upon; and which even after argument he may have revised and amended to reach and exactly to fit the merits of his case. Indeed it is said, that negative pleas were contrived expressly for the purpose of preventing this mischief. For, as it has been justly observed, any person might, by alleging a title, however false, sustain a bill in equity against any person for any thing, so far as to compel an answer; and thus the title to every estate, the transactions of every commercial house; and even the private transactions of every family might be exposed; and this might be done in the name of a pauper, at the instance of others, and for the worst purposes. (n)

This is a frightful view of the extent to which an unlimited right to call for a discovery by means of a bill in equity might be carried. But what is the remedy? A plea. This is not all. The reasons are here strongly presented to shew the great value and importance of pleas; not only as the commensurate and appropriate remedy or preventative, but as the sole and exclusive one. For it is not said, that if the party fails to betake himself to this shelter, he may find protection by any thing he can allege by way of answer; on the contrary, if he waives or is driven from his plea, we are told, that he will be then met by the rule which commands him to answer as fully as the bill requires. (o)

(n) Beam's Pleas Equ. 130.—(o) Prac. Reg. 275.

There appears to be some stress laid upon the peculiar claims which, it is said, a purchaser without notice has upon the court for its protection. And, from a careful consideration of the only case in which any reasons are to be found for the decisions which sanction this, as one of the exceptions to the rule, the court seems, in its anxiety to take due care of that favoured character, to have entirely skipped over the previous question; whether the defendant was, in truth, such a purchaser or not; and, taking it for granted, that he really was such a person, to have gone on to declaim upon the very eminent standing of such a character in a court of equity. The true and only question before the court was, whether a defendant, who had, in his answer, averred, that he was a purchaser without notice, could, thus, protect himself from the required discovery, without, or after he had failed to do so by plea, seems to have been passed by, or wholly lost sight of.

It may be admitted, that a purchaser without notice stands in a court of equity, upon the highest and strongest grounds; yet the course of the court is not to be perverted, or thrown into confusion for his behoof; he is to have justice; and the means whereby he may obtain it are ample and open to him. He may plead the fact, and thus avail himself of the advantage of his situation; and if he fails to do so, or does so improperly, he must, like other negligent persons, abide the consequences. (*p*) And there is much reason why he should be thus left to his fate, when it is recollected, that by a plea of purchase for valuable consideration without notice, the defendant tacitly admits, that he has no title; and thereby assumes a position analogous to that of a witness who refuses to answer lest he should criminate himself. (*q*)

But we have seen, that, in general, after a plea has been overruled, the defendant may insist on the same matter in his answer. Therefore, if these exceptions are to be allowed to the extent laid down, then the defendant's negation of the plaintiff's title; or allegation, that he himself is a purchaser without notice; which is thus to stand in the place of, and to do the business of a plea, will amount in fact to a mere repetition of the same plea, without the leave of the court; and the controversy may be thus renewed and reiterated for no one useful purpose. If a plea could be repeated, it would not do its office, it would not have the effect of saving

(*p*) *Jerrard v. Saunders*, 2 Ves., jun., 187, 454; *Sugd. Vend. Purch.* 553; *Ovey v. Leighton*, 1 Cond. Cha. Rep. 433; *Co. Litt.* 303.—(*q*) *Wallwyn v. Lee*, 9 Ves. 33.

litigation, but encourage defendants to try it as a daily experiment to gain time. (*r*) The case referred to, of the purchaser without notice, was, in fact, one of that kind. The defendant, in that very case, had pleaded the fact of his being a purchaser without notice; and having failed to sustain his plea, as a protection against the discovery required of him, he presented the same matter in his answer for that purpose, and succeeded. (*s*)

The adjudications upon which these exceptions to the rule rest, stand opposed, however, by high and venerable authority. They have never been respectfully acquiesced in; nor passed by, at any time, without question, or impeachment. They have introduced an anomalous form of pleading; and, have, to the extent of their bearing, distracted the principles by which proceedings in Chancery had been previously well regulated. According to the orderly and regular course, a defendant is always expected to resort to a plea as a means of introducing any negation or new matter on which he proposes to rely, for the purpose of putting a stop to further litigation, or of protecting himself from any useless, or injurious disclosures; since it is much to be wished, that the plaintiff's title should, in every instance, be established before he has the discovery. (*t*) Yet, if a defendant undertakes to set forth in his answer any matter which shews, that the plaintiff has no title; or which, if put into the shape of a plea, might have protected him from discovery, still having submitted to answer, he shall answer fully. (*u*) And, upon this ground, it has also been held, that if the fact of partnership, being a component part of the plaintiff's title, be denied in the answer; or an averment be made therein, that the partnership had been determined; it shall not protect the defendant from the discovery, or the production of the books required of him; because it was a proper subject for a plea, and he should have availed himself of it in that form. (*w*.) And so too, where a plaintiff asked for specific performance, and the defendant relied upon the statute of frauds, still he was ordered to discover all he knew respecting the agreement; because, although as against a mere parol agreement, the statute was a bar; yet as, after he had stated the agreement, the plaintiff might be able to

(*r*) *Freeland v. Johnson*, Antr. 410.—(*s*) *Jerrard v. Saunders*, 2 Ves., jun., 187, 454.—(*t*) *Newman v. Wallis*, 2 Bro. C. C. 143.—(*u*) *Richardson v. Mitchell*, Sel. Ca. Cha. 51; *Hall v. Noyes*, 3 Bro. C. C. 483.—(*w*) *Cartwright v. Hately*, 3 Bro. C. C. 239; *Hornby v. Pemberton*, Mosely, 57; ——— *v. Harrison*, 4 Mad. 252; *Leonard v. Leonard*, 1 Ball & Bea. 323

prove something which would take the case out of the statute, when applied to the agreement disclosed, he was, therefore, entitled to a discovery of the particulars of the agreement to enable him to do so. But if the plaintiff fails to do so, then the defendant would be allowed the benefit of the statute, notwithstanding his disclosures. (x)

The old rule was, either to demur, to plead upon something *dehors* the bill, or by a negative plea, or to answer throughout. And a wish has been expressed, even by one who seems to admit the correctness of some of the exceptions to this rule, that whenever a party is not bound to answer the interrogatories put, he should be obliged to take advantage of it by demurrer. But this new mode of proceeding, for such it is said to be, although the first instance of its allowance occurred as far back as the year 1661, has been stigmatized as a kind of incomprehensible *non-descript*. It is called a sort of illegitimate pleading; or a species of plea, which is neither a plea, answer, or demurrer, but a little of each; the various, and discordant opinions of some eminent men; that it was impossible the forms of pleading could be permitted to stand as altered by those reported cases; and that when the question came for decision it would be infinitely better to decide, that the objection to discovery should be made by plea rather than by answer. (y)

The inconvenience of this new mode of pleading is, that the defence is not judged of by the court, in the first instance, as it would be, if it were presented in the regular form of a plea; but is brought on, in the shape of exceptions to the answer, assuming a new, and, in this respect, a different form, more indefinite and more expensive. By a plea, the defendant puts in issue a single fact, or several facts constituting one defence admitting all the other facts of the bill, and upon that the parties go to trial; if it is found for the defendant, the bill is dismissed; if for the plaintiff he has a decree; or previously thereto further inquiry is directed, if necessary. But, in this new mode, the defendant answering just what he chooses, issue cannot be joined on the single fact supposed to be the bar; but the plaintiff, if he replies, must reply to the answer as he finds it; and must go into long expensive proof

(x) *Cooth v. Jackson*, 6 Ves. 37; *Rowe v. Teed*, 15 Ves. 375; *Givens v. Calder*, 2 Desau. 172.—(y) *Randal v. Head*, Hard. 188; *Selby v. Selby*, 4 Bro. C. C. 12; *Dolder v. Huntingfield*, 11 Ves. 283; *Faulder v. Stuart*, 11 Ves. 302; *Shaw v. Ching*, 11 Ves. 305; *Rowe v. Teed*, 15 Ves. 377; *Somerville v. Mackay*, 16 Ves. 387.

upon a great variety of facts, which is an unnecessary vexatious burthen thrown upon him. (z)

If the late cases, it is said, as far as they are authorities, (a) intimating by that turn of expression a doubt, whether they ought to be really so considered, have established these exceptions to this rule; then it would seem to follow as a necessary consequence, that the negation, or new matter relied on in the answer, to protect the defendant from discovery, must, at least, be brought forward by the answer as distinctly as if it had been pleaded. (b) And also, that all the facts stated in the bill, not covered by this form of defence, should, as in the case of a plea, be admitted to enable the plaintiff, at the hearing, to obtain a final decree for so much as was admitted, and sustained in opposition to the defence set up; in case a further discovery might not be necessary. But, as to all these matters, the new mode of proceeding is enveloped in darkness and uncertainty. Apparently aware of the difficulties into which the plaintiff would be thrown, in case the defendant should fail to sustain his defence in this form; it is said in one of those cases, that if such matter should be found against the defendant, he may be examined upon interrogatories to discover his knowledge. (c) But what weight is to be given to the answers to those interrogatories; and to what points are they to be directed? A plea places the case, and its several parts, in a clear, definitive condition; but this new fashioned defence distinctly specifies nothing.

After passing over this review of the subject, and considering how the law is chained together, and how important it is to preserve its consistency and harmony as a whole, and in its several parts; and that the genius of all our institutions requires, that no excrescences should be allowed to fasten upon and mar their simplicity; or retard their operations, and impose any unnecessary burthen upon a citizen who desires to obtain the benefit of them, it does seem to me, that this new course of proceeding can have no claim to the favourable consideration of this court. Besides, the Court of Chancery of Maryland is a judicial structure as little complicated as an institution of the kind can well be made. It is lumbered up with no useless officers; and its forms of proceeding have been almost entirely divested of every thing which would in

(z) *Shaw v. Ching*, 11 Ves. 305; *Somerville v. Mackay*, 16 Ves. 387.—(a) *Dolder v. Huntingfield*, 11 Ves. 293.—(b) *Faulder v. Stuart*, 11 Ves. 302.—(c) *Randal v. Head*, Hard. 188.

any manner, needlessly or expensively impede its course. Its movements, regulated by well settled principles, are calculated, by the easiest modes, to bring the substance and merits of the matter in dispute distinctly before it; and to carry a case, with the least possible circuitry, directly forward towards a final determination. But, if this new-fangled mode of pleading were allowed, the simplicity of our forms of proceeding would be materially broken in upon, and confused; great additional expense incurred; new delays produced; and a case which had been moved forward as to a final hearing, upon the matter in avoidance alleged in the answer; if it was not sustained, would be turned back to be investigated anew upon interrogatories propounded to the defendant, and then again brought to a final hearing upon them. The consequences would be most seriously injurious, if not destructive of the utility and value of this court.

Upon the whole, it appears to me, from the fairest and most mature consideration I have been able to bestow upon those adjudications, which have in any manner sanctioned these negative or affirmative exceptions to the ancient general rule, that a defendant, who submits to answer, must answer as fully as the bill requires, have authorized a departure from it, which cannot nor ought not to be approved and followed. And consequently, that this general rule must be allowed to stand for the government of proceedings in this court, without any exception whatever; for I do not consider, that the assumed foundations of the rule, or its modifications and qualifications as they have been explained, can, with any degree of propriety, be regarded as exceptions to its application and operation in any case.

On bringing the several answers of the defendants to the test of this general rule, it will most clearly appear, that they are certainly defective and insufficient to the full extent designated by the exceptions taken to them. Those exceptions must therefore be sustained.

The investigation called for by the plaintiff's exceptions, and the disposition which has been made of them, will be of service in the consideration of the next question that now stands for judgment; and that is, whether these answers are such as will entitle the defendant to a dissolution of the injunction?

Although these answers have withheld the discovery asked for by the bill; yet they have, in one sense, most positively denied all its equity; that is, in the sense in which it might be said to have

been denied by a demurrer, or a plea; but taken in another point of view, they have expressly admitted, or not denied the facts of the case out of which the plaintiff's equity arises. The facts of a plaintiff's case on which his injunction rests, may be materially different from those of his whole case on which he founds his claim to relief. (*d*)

Hence an answer may have denied all the facts on which the injunction rests, and yet be entirely insufficient in all other respects. But, may an injunction be dissolved on the coming in of an answer which is, in this respect, insufficient? If it can, then it will be enough for the court, on a motion to dissolve, to direct its attention chiefly or exclusively to so much of the bill and answer as speaks of the facts on which the injunction rests. But suppose the rule to be otherwise; and, that it requires the answer to be in all respects unexceptionable, then, upon a motion to dissolve, the court ought not to confine itself altogether to the consideration of those facts which produce the equity on which the injunction rests, but must comprehend the whole case as laid before it by the bill and answer; so far as the answer is, or ought to be responsive to the bill. There is yet a third aspect in which this subject may be viewed. An answer may be in all respects unexceptionable; and admitting all the facts stated in the bill, it may positively deny all its equity, in the sense of a denial by a plea; by shewing matter in avoidance; which if taken for true will operate as a bar. Is the court, on a motion to dissolve, to take the answer for true as to matter in avoidance; as well as in regard to allegations responsive to the bill? If it must, then the question will be; how stands the equity, taking the whole case represented by the defendant, as opposed to that shewn by the plaintiff?

These are important distinctions as regards a motion to dissolve; since it is perfectly clear, that, in almost every case, the result would vary according as the one or the other of these three modes of considering the subject should be adopted.

In England there appears to be several modes of obtaining and dissolving an injunction; and each of them seems to differ in some particulars from that pursued in this state.

After an injunction has been granted before answer, it is said, that, according to the English course of proceeding, the defendant may obtain an order to have the injunction dissolved on the

(*d*) *Hurst v. Thomas*, 2 Anst. 585, 591; *Doe v. Roe*, 1 Hopk. Rep. 276.

coming in of the answer unless cause shewn. The sole object of which order *nisi* is to give the plaintiff time to see whether the answer is correct and sufficient or not. Under this order the plaintiff may shew for cause, that the answer is impertinent or scandalous; and if, upon reference to a master, it is reported not to be so, the injunction is dissolved; but if otherwise, the impertinence may be expunged, and the plaintiff may then shew exceptions for cause; or he may shew cause upon the merits. (e) If he shews cause upon the exceptions, and cannot maintain them, there is no cause shewn, and the injunction is gone; (f) and, on shewing cause upon the merits, if the answer denies all the circumstances upon which the equity is founded, the universal practice is to give credit to the answer, and the injunction is dissolved upon the credit given to the answer for that purpose. (g) If a plea is ordered to stand for an answer, with liberty to except, the defendant may move to dissolve, in like manner as on the coming in of an answer. (h) But, if his demurrer or plea is allowed, he may move to dissolve absolutely in the first instance; (i) or the better opinion seems to be, that upon the allowance of the demurrer or plea, the injunction is gone at once without any motion to dissolve. (j) From which it appears, that, according to the English course of proceeding, on a motion to dissolve, a demurrer or plea allowed, and an unexceptionable answer, denying the equity of the bill, stand upon the same footing; and that the whole answer, as well that which is responsive to the bill, as that in which new matter is advanced in avoidance, is taken for true, credit is then given to it for every fact it asserts, and it is taken to be in all respects correct and sufficient.

Hence the intimate connexion, according to the English practice, between exceptions to the answer, and a motion to dissolve; the fate of the one almost always involving that of the other. And hence, too, the propriety of the expressions, so often found in the English books, that if the answer contains a sufficient defence to the case stated in the bill, the injunction will be dissolved; (k) and of shewing cause on the merits, or equity of the case confessed in the answer; (l) and that the defendant has answered and

(e) Eden Inj. 71, 73.—(f) Bishton v. Birch, 2 Ves. & Bea. 42; Lacy v. Hornby, 2 Ves. & Bea. 292.—(g) Eden Inj. 80.—(h) Eden Inj. 70.—(i) Mason v. Murray, 2 Dick. 536; Hurst v. Thomas, 2 Anst. 585.—(j) Travers v. Stafford, 2 Ves. 20.—(k) Eden Inj. 86.—(l) Eden Inj. 78.

denied the whole equity of the bill. (m) These phrases are sufficiently explicit in reference to the English practice, according to which, as to points of fact, an answer like a plea has then credit throughout for all it avers; and no distinction is then made between matters responsive and in avoidance. But in reference to a practice which recognizes the distinctions that have just been drawn between the case stated in the bill upon which the injunction rests; the case made by the bill as a ground for the relief prayed; and the case presented by the answer including both matter responsive and in avoidance, they are exceedingly ambiguous.

One of the articles of impeachment against Cardinal Woolsey was, that he, as Chancellor, had granted injunctions without any bill being put in. (n) And Lord Bacon, in reply to the king's instructions, pledged himself not to grant injunctions on the mere statement of the bill, but only on matter confessed by the defendant's answer; unless called for by pressing circumstances. (o) After which, it was declared, by a statute which is in force here, that no *subpæna* or any other process, except injunctions to stay waste or proceedings at law, should be granted before a bill was filed. (p) But, during the provincial government, it appears to have been the practice to grant an injunction to stay proceeding at law, before the filing of the bill; upon a petition briefly stating the circumstances; and that too, as it would seem, without any affidavit, or other evidence of the truth of the matters so stated. In which case the petition prayed an injunction until the matter could be heard on a bill to be filed, setting forth the facts more at large; and the bill, afterwards filed, prayed a continuance of the injunction as granted. (q) This course of proceeding was, no doubt, adopted on the ground of analogy to the English mode of granting an injunction in some cases for a similar purpose on an affidavit stating the facts of the case before the filing of the bill. (r) But I have met with no instance of this kind since the establishment of the republic.

According to the present course of proceeding, in this court, there is but one mode of obtaining an original injunction; and that is by a bill. To lay a proper foundation for an injunction, the

(m) Forum Rom. 196; 2 Harri. Prac. Cha. 263.—(n) 4 Inst. 92.—(o) Park His. Co. Cha. 82.—(p) 4 Ann, ch. 16, s. 22.—(q) Powell v. Speake, 1760, per SHARP, Chancellor.—(r) *Eden Proceedings*, lib. D. D. No. J, 83.—(r) Eden Inj. 36, 231.

bill should set forth a case of plain right, and a probable danger that the right would be defeated without the interposition of this court; (s) or it should appear, that the question was important and doubtful; (t) and the truth of the facts should be verified by an affidavit which is usually made by the plaintiff himself, or by one of the plaintiffs if there be more than one. That, however, is not essential; for, I have granted an injunction when the bill was sworn to by an agent of the plaintiff who was privy to the transaction, the plaintiff being a foreigner and resident abroad. (u) Indeed, an affidavit of any one does not appear to be indispensably necessary; if documentary, or any other kind of evidence be produced, sufficient to cause belief, and to induce the court to trust the bill for the truth of its statements. (w)

Having thus far placed confidence in the bill, that confidence will not be withdrawn until the coming in of the answer, in which the defendant is expected to respond clearly and distinctly to all those facts stated in the bill, producing that equity on which the injunction was awarded. In one case, reported among the English adjudications, it is laid down as a general rule, that where a plain equity set forth by the bill is admitted by the answer; but endeavoured to be avoided by another fact, the injunction shall always be continued to the hearing. (x)

This, unquestionably, is the rule by which this court is governed on a motion to dissolve, made on the coming in of the answer. It appears to me to be according to the reason of the thing; (y) and I am much inclined to believe, that this very case has been mainly instrumental in establishing that rule in this court. But it is not mentioned in any English abridgment, digest, compilation, or book, other than that book wherein it is reported; which Lord Mansfield absolutely forbid from being cited; declaring, that there was not one case in it which was right throughout. (z) Hence there is reason to believe, that although this case must be admitted as right throughout here, it may not be deemed so in England. (a)

In this court, the question presented, on a motion to dissolve, on the coming in of the answer, is not one which always or neces-

(s) Anonymous, 1 Vern. 120; *The State of Georgia v. Brailsford*, 2 Dall. 405.—
 (t) *Mestaer v. Gillespie*, 11 Ves. 636.—(u) *Dunlop v. Harrison*, 28 September, 1826.—(w) *Schermehorn v. L'Espenasse*, 2 Dall. 364.—(x) *Allen v. Crabcroft*, *Barnardiston Ch. Rep.* 373.—(y) *Minturn v. Seymour*, 4 John. C. C. 499.—
 (z) *Zouch v. Woolston*, 2 Burr, 1142, n.; *Boardman v. Jackson*, 2 Ball & Bea. 336.—(a) *Williams v. Hall*, 1 Bland, 195, n.

sarily involves the merits of the whole case, as set forth in the bill; it may be, and not unfrequently is, much narrower; because this court recognizes the distinctions between the case on which the injunction rests; the material head of equity which entitles the plaintiff to an injunction; (b) and that which forms the whole foundation of his prayer for relief; which, although often, are not necessarily one and the same case; and therefore, this question, on a motion to dissolve, properly extends only to the equitable grounds of the injunction and no further. (c)

If the answer expressly denies all the facts stated in the bill, or such a material part of them as leaves not enough to furnish an equitable foundation for the injunction, it must be dissolved. If, on the other hand, the defendant does not deny, or omits to respond to those facts which constitute the case on which the injunction rests; it must be continued. Hence, no matter, advanced by way of avoidance in the answer, is to have any weight on a motion to dissolve, any more than if it had been adduced in the form of a plea. Such matter in either shape, if sustained by proof, or admitted by setting the case down for final decision on bill and answer, may be a sufficient defence at the hearing, but it cannot, in either of those modes, be shewn as cause for dissolving the injunction on an interlocutory motion made for that purpose. (d)

(b) 1 Fowl. Exch. Pra. 226.—(c) *Doe v. Roe*, 1 Hopk. Rep. 276.—(d) *Simson v. Hart*, 14 John. 74; *Skinner v. White*, 17 John. 367.

BEARD v. WILLIAMS.—In an action brought by the State for the use of the Trustees of the Poor of Anne Arundel county, upon a collector's bond, he being dead, against his sureties for not having paid over the money which had been assessed, and was collected by him for the use of the poor, a judgment was obtained in the General Court at May term, 1796, to be released on the payment of £277 10s. 7½d. current money, with interest of ten per cent. from the 1st of October, 1790, and costs. These trustees were made a body politic by the act of 1768, ch. 29. And the collector's bond was given under the act of October, 1780, ch. 26, (Hanson's Laws,) by which it is provided, that, in case the collector shall fail to pay the moneys collected, his bond may be put in suit, in which proceedings may be had to compel payment of the money due with an interest of *ten per cent.*, from the day appointed for payment, (1794, ch. 53, s. 2, *a similar provision except that only six per cent. is to be recovered.*) The defendants at law, Matthew Beard and others, filed this bill, alleging, that the trustees, James Williams and others, had not given to their principal, the late collector, all the credits to which he was entitled; and that the trustees had not been legally elected; and, therefore, they were neither entitled to sue for or receive the moneys collected. Whereupon they prayed an injunction, which was granted.

The defendants answered, and the case was brought on for a final hearing.

10th March, 1800.—**HANSON, Chancellor.**—This cause being submitted on the bill, answer and exhibits, the same were by the Chancellor read and considered.

The court, on such a motion, gives credit to the answer only so far as it is responsive to the case stated by the bill on which the

The injunction, in this cause issued, was granted merely on the ground of the complainant's stating himself to be liable to be executed at law for much more money than was fairly due. As to the other ground stated in the bill, viz: that there was no just foundation for the judgment at law, the Chancellor long since gave his opinion, that if this be the case the complainant ought to have availed himself of the point in the General Court.

The Chancellor perceives not the least foundation for relief in this court; except what is stated by Williams, the defendant, viz: the payment to him of £112 10s. by Mrs. Howard, &c. For this sum the complainant is certainly entitled to credit.

On the whole it is *DECREED*, that the injunction, in this cause issued, be and it is hereby declared to be dissolved; provided, that not more be levied by execution at law against the complainant by the defendants, than the sum of three hundred and thirty pounds fifteen shillings and eleven pence, with the legal interest of six per centum thereon, from the first day of October, seventeen hundred and ninety-six, until the time of levying or payment. It is further *Decreed*, that each party bear the proper costs.

In stating the account the Chancellor has charged *ten per cent.* interest to May 1st, 1796, as the date of the judgment. The aggregate sum is £432 9s. 8d. and six per cent. = £10 16s. 3d. is charged thereon to October 1st, 1796, when credit is given for the payment as stated by the answer of £112 10s. It is the balance with interest of *six per cent.* which is to be levied. It did not appear to the Chancellor, that the *ten per cent.* could be charged after judgment; but that whatever was due at the time of the judgment should form a principal on which *six per cent.* only should be charged. (*Hammond v. Hammond*, 2 *Bland*, 370.)

The following is the statement made by the Chancellor:

October 1st, 1790, principal sum due,	£277 10s. 7½d.
May 1st, 1796. Date of judgment, interest thereon of 10 per cent.	154 19s. 0½d.
Total,	£432 9s. 8d.
October 1st, 1796, interest of six per cent.	10 16s. 3d.
	£443 5s. 11 d.
By cash,	112 10s. 0d.
	<u>£330 15s. 11d.</u>

N. B. This case was submitted for *final decision on the bill, answer and exhibits*. So that, in fact, no defence against Williams' claim has been made. And the answer, according to the established principles of this court, is to be taken for truth; and the allegations of the bill on oath, although sufficient for obtaining the injunction, in the first instance, avail nothing on final hearing. The Chancellor makes this remark for the satisfaction of the complainant, who thought proper to send him a private letter relative to the suit; and which letter could not, with propriety, have any influence on the mind of the Chancellor; who, in all cases, is to decide from the bill, answer, and proofs; and not from the bare allegations of the parties. There is one remark which might have been properly made in the decree. The answer states a debt due to Williams, on his private account, as well as the debt due to the trustees; and it does not appear, that Mrs. Howard directed the application of her payment to be made to the latter debt. It does not then appear, that Williams did otherwise than right in making the application to his own claim, as any other man might honestly have done in his case—M. S.

injunction was granted, and no further. And the confidence it had reposed in the bill will not be shaken, unless it is fully answered, and its truth, is, in point of fact, materially denied.

An answer should always be sworn to by the respondent; for it is only the answer of him who swears to it, although it may purport to be the answer of others. The statement or denial of facts within the defendant's own knowledge should be made distinctly and positively; or, at least, as much so as his recollection will admit. But if the defendant be charged in a representative character, such as that of an executor, he may answer on his belief, and shew such pregnant circumstances as the foundation of that belief as to induce the court to adopt and act upon it. (*e*)

It is no objection to the validity and efficacy of an answer, in this respect, that the defendant is infamous, or a negro; and, as such, an incompetent witness in ordinary cases; his answer must, notwithstanding, have full credit allowed to it; since the plaintiff, by calling him into court, has given him a competency to this extent for the purpose of defending himself and protecting his property; (*f*) if it were otherwise, in all cases, where a bill or answer is required, by the rules of the court, to be verified by an affidavit of the party himself, as he would be incapable of complying with the rule, he would be denied the benefit of justice, and, in effect, placed in a condition little better than an outlaw. (*g*) Upon similar principles, I have held, that where a corporation aggregate alone was the defendant, its answer, under seal, was admitted and credited as if made on oath; because it could not answer in any other way; and the plaintiff by so calling for its answer, had tacitly admitted its sufficiency; and because without its being allowed all the effect of an answer on oath the corporation could not protect its property. (*h*) The facts stated in the bill, and those responsive thereto, as set forth in the answer, are poised against each other; and so far as they are contradictory, those of the answer, being always allowed to preponderate, the injunction is dissolved or continued accordingly. (*i*)

Carrying with us these principles and rules to the consideration of the answers of these defendants, and it will be seen, that they

(*e*) *Jones v. Magill*, 1 Bland, 177.—(*f*) *Davis & Carter's case*, 2 Salk. 461; S. C. 5 Mod. 74; *Omychund v. Barker*, 1 Atk. 50; *Wilson v. Polk, a free negro*, 6 November, 1826, M. S.; 1717, ch. 13, s. 2.—(*g*) *Bowyer v. McEvoy*, 1 Ball & Bea. 562.—(*h*) *Bayard v. The Chesapeake & Delaware Company*, 18 October, 1828, M. S.—(*i*) *Gibson v. Tilton*, 1 Bland, 355.

are by no means such answers as can, upon any grounds, entitle them to a dissolution of the injunction.

Whereupon, it is *Ordered*, that the several exceptions to the answers of the defendants be and they are hereby declared to be valid; and the defendants and each of them are hereby required to make and file a full and sufficient answer to the plaintiff's bill of complaint on or before the twentieth day of December next. And it is further *Ordered*, that the injunction heretofore granted, be and the same is hereby continued until the final hearing or further order.

The defendant *Elizabeth Clagett* filed a further answer, and the plaintiff put in a general replication; and commissions were issued to take testimony, which were returned, and the case set down for final hearing. After which, on the 16th of June, 1830, the plaintiff by his petition, which, it was agreed, should be received as on oath, stated, that by mistake, the depositions of two of his witnesses had not been taken, that their testimony was material, competent and proper; by which he expected to prove, that the defendant *Thomas Clagett* was indebted to him in the sum of \$9,000, after giving him all due credits; and that the said sum was secured by the mortgage by which *Thomas Clagett* and the other defendants were bound; and he further stated, that the testimony of those witnesses had not been taken, owing to a mistake produced by another suit being then depending in this court between this plaintiff and the defendant *Thomas Clagett*. Upon which a commission was prayed, &c. Whereupon, it was *Ordered*, that a commission issue as prayed, returnable to the first day of the then next July term; reserving to the defendants the right to call for a final hearing during that term.

At July term, 1830, the case standing ready for final hearing was opened and argued by a solicitor on the part of the plaintiff; when it was objected, on the part of the defendants, that there was no proof to sustain the allegations and exhibits of the bill, that certain notes for goods sold had been given by the defendant *Thomas Clagett*; or of the notes which had been lent by *Salmon* to *Thomas Clagett*. Whereupon, the plaintiff by his petition on oath, stated, that owing to an oversight and misapprehension of his solicitors, produced by their attention being called off to another cause then depending here between himself and *Thomas Clagett*, the testimony in relation to those notes then exhibited

with his petition had not been taken ; and he therefore prayed that a commission might be issued for that purpose.

21st July, 1830.—BLAND, *Chancellor*.—*Ordered*, that this case stand continued to the next term ; and that the plaintiff have a commission to take testimony as prayed : *Provided*, that the testimony be taken, and the commission returned on or before the first day of September next. And it is further *Ordered*, that all the costs and expense of the said commission and of executing the same be borne by the plaintiff.

After the commission thus granted had been returned, the plaintiff by his petition on oath, set forth, that the deposition of *Charles Snithen*, a witness competent and proper, had not been taken, by whom he expects to prove, that certain promissory notes given by the defendants, and also certain notes given by *Thomas Clagett*, one of the defendants, were given for goods, &c.; and also, that certain responsibilities were assumed and notes given by the plaintiff to the creditors of *Thomas Clagett*; that there were certain documents, in the city of Baltimore, which it was deemed important for the witness to prove ; and that the petitioner had used all reasonable diligence to have the witness before the commissioners ; but could not do so, because he had gone beyond the jurisdiction of this court ; and had only come again into this state, since the return of the commission. Upon which he prayed for a commission, &c. This petition was submitted on the part of the defendants with a mere denial of the plaintiff's right to a petition.

6th September, 1830.—BLAND, *Chancellor*.—After a case has been set for hearing, or stands so according to the course of the court, no new commission to take testimony, or further time for that purpose can be allowed to either party, but by a special order. To obtain such an order the party must by a petition, on oath, state the name of the witness, without whose testimony he cannot safely proceed to hearing ; the points to which he can materially depose ; and the reason why he has not been previously examined, if it should not sufficiently appear from the nature and circumstances of the case. (j) Here, however, the plaintiff has laid a sufficient foundation for granting the prayer of his petition.

(j) 1 Vern. 331; *Jessup v. Dupont*, Barnar. 193; *Oldham v. Carleton*, 4 Bro. C. C. 88; *Rongemont v. The Royal Exchange Assurance Company*, 7 Ves. 304; *Mendizabel v. Machado*, 1 Cond. Cha. Rep. 553.

Ordered, that a commission issue as prayed; that the testimony taken under the same be subject to all legal exceptions, and be returned on or before the fourth day of the next term; at which term this case is to stand for hearing. But nothing herein shall be so construed as to preclude the defendants from asking a continuance of the case if deemed necessary to take further testimony on their part.

Under this order a commission was issued and testimony taken and returned accordingly.

30th December, 1830.—BLAND, *Chancellor*.—This case standing ready for hearing, and the solicitors of the parties having been fully heard the proceedings were read and considered.

The proofs substantially sustain the allegations of the bill, and leaving none of the facts of doubtful credibility, there is nothing to be determined but the principles of equity properly arising out of those established facts.

The defendants contend that the mortgage is void upon its face, to the extent of the personalty at least, as having been made by one who is incompetent so to dispose of it; and also, that it is a nullity as against one of the grantors who was an infant when he signed it; and against all of them; because it has not the requisite solemnity of such a contract, that of having been recorded in time; and further, that there is an implied contract, attendant upon this mortgage, which imposes obligations upon *Salmon*, in favour of the sureties of *Thomas Clagett*, which *Salmon* has, in various ways, so disregarded as to have released those sureties from the incumbrance of the mortgage.

In answer to which it is denied, that any act of *Salmon's* as here shewn, can be considered as having that operation; and moreover it is urged, that all the obligations of the implied contract have been carefully and effectually preserved for the benefit of those sureties, so that they can have no ground to complain of *Salmon's* acts whatever they may have been.

Then passing from the subject of the suit, to the suit itself, it is objected, that the plaintiff can have no relief in this case; because the suit has been instituted too soon; and because to perpetuate the injunction merely, would be to lay the defendants subject to the caprice of the plaintiff without leaving them any means of extricating themselves. These are the matters to be considered.

In taking the position, that the mortgage is absolutely void,

because the grantor, as administratrix, had no power to make such a deed, I understand the defendants as making no such objection to it, as a conveyance of the realty therein mentioned; and as also assuming the ground, that unless it can avail the plaintiff as a deed proceeding from the administratrix, who alone, among the grantors, had the power thus to sell, or pledge the personalty, it must fail as to that altogether. I shall, therefore, as regards this position, consider this deed as embracing nothing more than the property therein specified as the assets which *Elizabeth Clagett* held as the administratrix of *William Clagett*, deceased.

An executor or administrator is, in equity, regarded as a trustee; but then, in equity, as well as at law, an administrator is considered, in general, as the absolute owner of the assets of the deceased, whether they be legal or equitable, or *choses in action*. The exercise of the powers of unqualified ownership to a certain extent is indispensably necessary to enable him to execute his trust, and to discharge his duty to advantage, and also to prevent the general inconvenience of implicating and entangling third persons in inquiries as to the application he may propose to make of the money produced by the conversion of the assets. A fair purchaser for a valuable consideration is, in no way, bound to see to the application of the purchase money by an executor. He cannot have the means of knowing the debts of the deceased; and is, therefore, absolved from all inquiry respecting them. Upon these general principles, not even a creditor of the deceased is permitted to follow the assets so aliened; for the demand of a creditor is only a personal demand against the executor in respect of the assets come to his hands, but no lien on the assets. And a specific or residuary legatee can stand upon no higher ground, in this respect, than a creditor. (*k*)

The only qualification of this general rule is, where the transaction is, in some way, tainted by fraud. Every person who acquires personal assets by a breach of trust, or *devastavit* in the executor or administrator is responsible to those entitled under the will, or as creditors, or next of kin, if he be a party to the breach of trust. What will amount to a fraud of this kind must depend upon the circumstances of the case. It is said, that generally speaking, he does not become a party to the breach of trust by

(*k*) *Nugent v. Gifford*, 1 Atk. 463; *McLeod v. Drummond*, 14 Ves. 359; S. C. 17 Ves. 153; *Keane v. Roberts*, 4 Mad. 357; *Power Morg.* 136, note.

buying, or receiving as a pledge for money advanced to the executor, at the time, any part of the personal assets, whether specifically given by the will or otherwise; because this sale or pledge is held to be *prima facie*, consistent with the duty of an executor. Generally speaking he does become a party to the breach of trust by buying or receiving in pledge any part of the personal assets, not for money advanced at the time; but in satisfaction of his private debt; because this sale or pledge is *prima facie*, inconsistent with the duty of an executor. (l)

In this case the administratrix has not sold or pledged the assets of her intestate for money advanced to her by *Salmon*; but she has mortgaged them to indemnify *Salmon* for any loss he may sustain, in the manner described, from *Thomas Clagett*. *Salmon* has advanced no money to this administratrix which she might, or might not have applied to the uses, and for the benefit of the estate of her intestate. On the contrary, this mortgage is, on the part of the administratrix, a voluntary pledge of the assets of her intestate, to insure the payment of the debt of another. It is upon the face of it, and in terms an application of the assets in a manner wholly inconsistent with her duty as administratrix; and *Salmon*, as the grantee, is a party to this breach of trust. This mortgage must, therefore, be considered, at least *prima facie*, in equity as a fraudulent application of the assets, as against all those who have a claim upon them as creditors, or next of kin of the intestate.

But there is here no creditor, nor any one of the next of kin of the deceased who makes any objection to this mortgage, or who asks to have it set aside, on the ground of fraud, to let in his claim. There is no such person now here attempting to follow these assets for any such purpose. And if there be any one who has an interest in the personal property so pledged independently of, and superior to those bound by, or who claim under this deed, they are not now before this court. And it is very clear, that none of these defendants can be suffered to impugn their own deed for the benefit of others not parties to this suit.

Administration was granted to this defendant *Elizabeth Clagett*, so long ago as the year 1816, and she executed this mortgage on the 22d of September, 1827, then having this property in her possession. It is not intimated, that there are any outstanding debts due from the intestate; and if these his children, who are here as

(l) *Keane v. Roberts*, 4 Mad. 357; *Downes v. Power*, 2 Ball & Bea. 491.

defendants, had any claim as distributees, they have made none, and therefore, must be presumed to have been satisfied. But, supposing they had not received any satisfaction for their respective distributive shares, they have, by this their own deed, completely bound up and mortgaged the whole of their interest, whatever it may be, to its utmost extent. (m)

Richard H. Clagett by his answer relies upon the fact of his having been an infant at the time he signed the mortgage, as an ample defence for himself. The fact of his infancy is fully established by the proofs. He, however, asks for himself no more than to be discharged from the obligatory force of the deed; and to have it treated as a nullity so far as it is made the foundation of any claim *against* him. But he makes no claim of his distributive share of the intestate's estate in any form. He does not allege, that he has not been satisfied by this administratrix to the full amount of his distributive portion. So far from making any such assertion of his own individual rights in opposition to this deed, he plants his defence against it, apart from the allegation of his infancy, in all respects, upon the same ground taken by all the other defendants. And consequently, although he cannot, because of his infancy, be bound by the mortgage as his deed; yet having, by his answer, failed to assert his right, when thus implicated and called on to do so, he must be considered as having waived all objection to this mortgage on the ground of its having made any improper disposition of his interests inconsistent with the office and duty of the administratrix. (n) Hence, as *Richard H. Clagett*, for this reason, can, on the one hand, claim no protection of his interests in this suit; so, on the other; because of his infancy, there can be no decree against him. I shall therefore dismiss the bill as to him.

It has been urged, however, that although this administratrix might have had sufficient power so to dispose of the assets; or that the questionable disposition thus made of them, had been fully affirmed by the distributees; yet that the instrument by which it was proposed to be effected, not having been recorded, is, in that respect, deficient in one of the solemnities necessary to constitute a valid mortgage.

By the common law, to make a valid deed certain forms and ceremonies are indispensably necessary, in that way, to manifest the

(m) *M'Leod v. Drummond*, 17 Ves. 170.—(n) *Stackhouse v. Barnston*, 10 Ves. 466.

deliberate will of the contracting parties ; and it is admitted, that this mortgage has all the common law requisites of a binding deed. But the legislative enactments here, which require deeds to be recorded, like those of England requiring enrollment, are universally admitted to have been intended to preserve the evidence of the contract ; and to prevent the practice of fraud upon creditors and purchasers. The object was to furnish the means of notice and a protection to innocent third persons, not parties to the contract. It never has been held, that those laws altered any principle of the common law, or required any thing, in addition to the common law solemnities as a necessary constituent of a deed to secure the payment of money, as between the parties to it. Hence, a deed of this kind, as between the parties themselves, has always been deemed as valid and effectual without recording as with it. And as to creditors and purchasers, if they have, by any other means, obtained that notice, which it was the design of recording to give, even they are not allowed to object to the validity and operation of the deed on that account. But, in no instance, has any of the immediate parties to such a deed ever been suffered to object, that it should not be enforced ; because it had not been recorded in time ; such an objection can only come from a creditor, a purchaser, or some innocent third person whose interests are affected by the deed. Here there is no such third person before the court ; the objection is made by some of the parties to the mortgage itself ; which cannot be permitted ; since as to them the deed is valid by the common law ; and in no way affected, as a security for money, by the acts of Assembly requiring such instruments to be recorded. There is then, nothing in this position taken against the validity of the mortgage. (o)

It appears that *Charles Salmon* had agreed to lend his credit to *Thomas Clagett*, by selling him goods to be paid for at some future day ; by lending him money ; and by becoming his surety, in the way of lending or endorsing notes. Hence, in respect to that agreement, they stand towards each other simply as creditor and debtor. But, for the purpose of securing *Salmon* against any loss he might sustain by the credit so given ; *Thomas Clagett* with *Elizabeth Clagett* and others mortgaged their property to *Salmon* ;

(o) 2 Inst. 674 ; *Northcott v. Underhill*, 1 Ld. Raym. 388 ; S. C. 1 Salk. 199 ; Bac. Abr. tit. Bargain and Sale, E. 1 ; *Bushell v. Bushell*, 1 Scho. & Lef. 98 ; *Wood v. Owings*, 1 Cran. 240 ; *Hamilton v. Russell*, 1 Cran. 315 ; *Dorsey v. Smithson*, 6 H. & J. 61 ; *Hudson v. Warner*, 2 H. & G. 415.

and consequently, to the extent of *Salmon's* claim for indemnity under the mortgage, he must be regarded as the creditor; *Thomas Clagett* as the principal debtor; and *Elizabeth Clagett* with the other mortgagors as his sureties. This is the situation in which the parties have been placed by the mortgage itself; and this suit brings them here in the same relation towards each other. The dealings between *Salmon* and *Thomas Clagett* are no otherwise of any importance, in this case, than as shewing the consideration on which *Salmon's* claim is founded; and that it is of some amount; or how far any of *Salmon's* conduct, in relation to those dealings may have impaired that implied contract by virtue of which the sureties of *Thomas Clagett* have a right to have the impending loss averted from them by a bill *quia timet*; or to take the place of *Salmon* in order to obtain reimbursement.

It is universally admitted, wherever the relation of principal debtor and surety subsists, that if the surety pays the whole debt, he has a right to be put into the place of the creditor as to all his remedies for the recovery of the debt. This right of subrogation is recognized in courts of common law as founded upon an implied contract; and in Chancery as resting upon such a contract; or as an equity properly belonging to the case; or as based upon a principle of natural justice, which springs into existence immediately, that the debt falls due, and the surety becomes liable to be called on for payment. This implied contract binds the creditor, if required, by bill in equity at the instance of the surety, to sue immediately for the recovery of his debt; or, if the debt has been wholly paid by the surety, to transfer to him all his securities; as well those which he held at the time the surety became bound as those which he may have since acquired, even without the privity, or knowledge of the surety; such as a judgment recovered against the principal; or a mortgage by way of collateral security. The surety, in such case, has a right to an assignment of all the creditor's securities, to enable him to proceed immediately, in the same manner, as the creditor might have done to obtain satisfaction or reimbursement. And therefore, if the creditor, being competent to contract, has by express agreement enlarged the day of payment; or has, by his acts, increased the peril of the surety; or has parted with any of his securities; or has, in any other manner, altered or impaired the obligation of the implied contract, which, for the protection of the surety, is always associated with the express contract as its inseparable incident, then the

surety is discharged; upon the ground, that all such acts are against the faith of the implied contract, by virtue of which, the surety had precisely the same right the creditor had; and must be allowed to take his place in all respects; and also upon the ground that the creditor is a trustee of his security; that is, the bond, judgment, execution, or the like, for all parties interested in it; or who may ultimately resort to it for relief. (*p*)

It is believed that the obligation of private contracts has been regarded by all civilized people as of the highest and most inviolable sanctity; and according to our fundamental law, there is no power in the land by which the *obligation* of such contracts can be, in any manner, lessened or impaired. Here, and as to this point, it is not pretended, that the mortgage itself has been, or can be, in any way, stripped of a single atom of its own proper, legal or equitable, obligatory force. But these defendants, who stand here as sureties, referring to that implied contract, the incident of the mortgage, to the full benefit of which they are entitled; urge, that its obligation has been materially impaired to their prejudice; and therefore, that they are discharged. They allege that its obligation has been altered, diminished, or destroyed by the circumstance of *Salmon* having increased their peril by giving to *Thomas Clagett* credit for an amount greater than that specified in the deed; and by having, by an express agreement with *Thomas Clagett*, after the debt became due, enlarged the time of payment; and also by his having released a security he had procured, by means of which he might, for aught that appears, have obtained a complete satisfaction of his debt.

On behalf of the sureties of *Thomas Clagett*, it was contended, that their guaranty of indemnity was, in all respects, a limited one, by which they not only intended that they themselves should not be responsible beyond a specified amount; but that *Thomas Clagett* should not be credited for more than that amount by *Salmon*; because by so involving him beyond the specified sum, his situa-

(*p*) *Baker v. Shelbury*, 1 Cha. Ca. 70; *Ranelaugh v. Hayes*, 1 Vern. 190; *Parsons v. Briddock*, 2 Vern. 608; *Nisbet v. Smith*, 2 Bro. C. C. 579; *Ex parte Smith*, 3 Bro. C. C. 1; *Rees v. Berrington*, 2 Ves., jun., 540; *Ex parte Rushforth*, 10 Ves. 420; *Wright v. Morley*, 11 Ves. 22; *Craythorne v. Swinburne*, 14 Ves. 164; *Samuell v. Howarth*, 3 Meriv. 272; *Antrobus v. Davidson*, 3 Meriv. 570; *Mayhew v. Crickett*, 2 Swan. 187; *Wallwyn v. St. Quinton*, 1 Bos. & Pul. 652; *English v. Darley*, 2 Bos. & Pul. 61; *Ward v. Johnson*, 6 Mun. 6; *Hill v. Bull*, Gilm. 149; *M'Mahon v. Fawcett*, 2 Rand. 514; *Creager v. Bringle*, 5 H. & J. 234; *Bowers v. The State*, 7 H. & J. 32; *Hollingsworth v. Floyd*, 2 H. & G. 87; *Lenox v. Prout*, 3 Wheat. 520.

tion would be rendered more precarious, and they would thereby become more likely to be damnified.

If that was the intention of these sureties, they certainly have not so distinctly expressed themselves by this mortgage. That deed evidently purports to be a continuing guaranty, not merely until the sureties should think proper to put an end to it, by giving notice to *Salmon*, that it should be no longer continued; but its duration forms an express part of the contract itself; it was to endure until the 1st of October, 1830, and no longer. And it was not to exceed in amount the sum of \$10,000; thus limiting the extent of the liability of the sureties without making the slightest allusion to the extent of the credit which *Thomas Clagett* might obtain from *Salmon* or any one else; or to the scope of his business; or to the perils and risks in which he might be involved by the wide range of his commercial concerns. The sense and substance of this mortgage, considered as a guaranty, comes to this, that these sureties thereby undertake to sustain the credit of *Thomas Clagett* to an amount not exceeding \$10,000, continually from that time until the 1st of October, 1830. It is, therefore, of no importance as regards this mortgage, what may be the amount of the debt due from *Thomas Clagett* to *Salmon* beyond that sum; since the mortgage covers no more than \$10,000; nor is it of any consequence when, within the specified period of time, the credit was given by *Salmon* to *Thomas Clagett*, so it was given in the manner described in the deed. The proofs clearly establish the fact, that the liability from *Thomas Clagett* to *Salmon* was incurred in the mode specified by the deed; therefore, I am of opinion, that there is no foundation for this objection. (q)

It has also been insisted, that the credit has been extended, and the time of payment enlarged, by the agreement of the 26th of May, 1828. Whether that can be so considered must depend upon what shall be deemed the true meaning of the mortgage.

I take the sense of that contract to be, that *Salmon*, upon the faith of the property so pledged to him, agreed to lend his credit to *Thomas Clagett* during a certain time, and to a specified amount. The sole object of that deed was to obtain for *Thomas Clagett* such a credit; but if the mortgage might have been foreclosed, at any time, to enforce payment for any parcel of goods sold; and of every sum of money lent by *Salmon* to *Thomas Clagett*, as it be-

came due, the very object of the deed might have been defeated. He would not have obtained such a credit, as could have been used by him, as a capital with which to prosecute his business. The mortgaged property might have been sold, or the sureties be forced, at once, to pay, when by postponing the payment, under the assurance of the guaranty, until the 1st of October, 1830, *Thomas Clagett's* business, even if he should fail, might be so wound up as to produce no embarrassment, nor result in loss to any one. For, in general, where a party undertakes to do any act within, or upon the expiration of a limited time, he cannot be sued and charged with a breach of his agreement before the lapse of the specified time; unless he has himself previously rendered the performance of his contract absolutely impossible. (r) The limitation of the amount of the credit to \$10,000, also shews it to have been the true meaning of the parties, that *Salmon*, on his part, undertook and agreed to give credit to *Thomas Clagett* to that amount, in the manner described, until the 1st of October, 1830.

Much stress has been laid upon the fact, that the notes given by *Thomas Clagett* and some others of the grantors, fell due long before the 1st of October, 1830, and that *Salmon* being then unable to pay, he must then be considered as entitled to indemnity by a foreclosure of the mortgage. But that very circumstance shews, that it could not have been their intention to subject them properly to a foreclosure of their mortgage immediately that those notes fell due; because the express object, in so pledging their property, was to sustain *Thomas Clagett's* credit to a period far beyond that time. I am, therefore, of opinion, that the mortgage could not have been foreclosed before the 1st of October, 1830; and consequently, the stipulation in the agreement, that it should not be foreclosed until two years after the 26th of May, 1828, cannot be considered as an enlargement of the time of payment to the prejudice of these sureties, who could not be called on for payment before the mortgage credit had expired.

The defendants have further insisted, that the deed of the 17th of May, 1828, by which *Thomas Clagett* made an assignment of his goods for the benefit of his creditors, gave to *Salmon* a security for the payment of the debt covered by the mortgage, which he was bound to make available to its full extent; or to hold it for the benefit of the sureties of *Thomas Clagett*.

(r) Sir Anthony Main's case, 5 Co. 21.

But that deed could not, in any way, be considered as a security held by *Salmon*. His debtor, *Thomas Clagett*, placed certain funds, by its means, in the hands of trustees for the benefit of his creditors generally, which might have been so applied or not; but nothing was thereby put into the hands of *Salmon*, or placed exclusively within his power or control. The agreement of the 26th of the same month, it is true, did give *Salmon* an additional security for his debt; but he alleges, and it is in proof, that he still holds that security, and has used all due diligence to make it as productive as possible. There is, therefore, no foundation for this objection upon which these sureties claim to be discharged.

By the agreement of the 26th of May, 1828, it was stipulated, that after it had been executed by the respective parties, that all responsibilities to and from *Thomas Clagett* should be annulled, so far as the persons represented by those who signed it might be concerned.

The responsibilities to and from *Thomas Clagett*, here referred to, were the notes of *Thomas Clagett*, and his contracts for the payment of money held by *Salmon*; and his other creditors. It is, however, only those responsibilities, or securities held by *Salmon* alone, and which he annulled, that can, in any way, be considered as prejudicial to these sureties. The whole instrument of the 26th of May, 1828, must be taken together; and so taken, it appears, that *Salmon* himself discharged *Thomas Clagett* from no responsibility whatever; because it is expressly stipulated, that *Salmon* should retain the mortgage to indemnify him for any deficiency which might exist after the application of the funds then put into his hands; in other words, that after so obtaining a partial payment, *Thomas Clagett* should be held bound as his debtor for the balance. So far, then, there is nothing like a discharge of any security held by *Salmon*.

But *Salmon*, it is said, held the notes of *Thomas Clagett*; and it is true he did; they were notes signed or endorsed by the family of *Thomas Clagett*, who are these very mortgagors and sureties; and the family of *Thomas Clagett* were expressly exonerated from them only. Those notes were securities upon which they could not sue, nor derive any benefit from; because they were their own; and an assignment of them according to the requisitions of the implied contract, would have amounted precisely to that which this agreement declared, a complete exoneration of their liability, and nothing more. It also appears, that *Salmon*

had lent his name to *Thomas Clagett*, which *Salmon* had taken up at maturity; but these were responsibilities or securities upon which *Thomas Clagett* could not have been sued, upon assignment, in any form, from *Salmon*. The securities, which a surety has a right to have transferred to him, must be such as would have enabled the creditor to obtain satisfaction of his debt from funds, or from persons other than the surety himself; but in this case there were no such securities held by *Salmon*. It follows, therefore, that this objection also of the defendants must fail.

But the plaintiff contended, that even if the mortgage might have been foreclosed at any time after he became liable on his notes lent to *Thomas Clagett*; or after *Thomas Clagett's* notes; or the money he lent him became due; and even if the agreement of the 26th of May, 1828, should be considered as an express enlargement of the time of payment; yet, that these sureties cannot be discharged; because all the remedies have been reserved.

It is laid down, that a composition with, or giving time to the principal debtor with a reservation of the creditor's remedies will not discharge the surety. The giving of time to the principal debtor with a reservation of the remedies, has, in many cases, the appearance of absurdity; because, when distinctly understood, it seems to be almost a flat contradiction in terms. Such a reservation of remedies in order to hold the surety bound must amount to this, that the creditor agrees to give time to the debtor; and yet, that they both agree, that the surety may, at any time, force the creditor to proceed against the principal by a bill *quia timet*, or by paying the whole debt, have an assignment of all the securities and proceed immediately himself against the principal debtor; or in any other mode authorized by the assigned securities. Such an agreement, reserving the remedies, might not, in many cases, be of the least benefit to the principal debtor; since it leaves him entirely at the mercy of his surety; yet if the parties do so expressly contract, the surety can have no cause to complain, that the implied contract has been altered or impaired, in any way, to his prejudice; and therefore he cannot be discharged. (s)

(s) *Ex parte Gifford*, 6 Ves. 807; *Boulton v. Stubbins*, 18 Ves. 20; *Clarke v. Devlin*, 3 Bos. & Pul. 363; *Gould v. Robson*, 8 East. 576; *The United States v. Stansbury*, 1 Peters, 573. It has been provided, in regard to public debtors, that where an indulgence has been granted to such a debtor, by extending the time of payment, his surety may, after the time of payment has elapsed, or been extended by the Legislature, call for new security, and if it be not given, may proceed by execution.—*November, 1787, ch. 40, not in Killy, but still in force.*

By the agreement of the 26th of May, 1828, it is expressly declared, that nothing therein contained should, in any manner, affect the mortgage given by *Thomas Clagett*, and his family, to indemnify *Salmon* against certain risks and losses. If this general reservation had been made in an agreement between *Salmon* and the other creditors of *Thomas Clagett* alone, there might have been some difficulty in treating it as such a reservation as would preserve to the sureties the benefit of the implied contract in all respects; because, it is not enough, that the creditor alone should make such a stipulation; the principal debtor must also consent, that his liability to the surety should remain entire and undiminished. But here *Thomas Clagett* by signing this agreement, has thereby distinctly assented to this express reservation of the remedies upon the mortgage itself, as well as upon its incident implied contract; for the stipulation, that nothing therein contained should affect the mortgage, must, according to every fair interpretation of the expression, be considered as a complete reservation of the remedies to this whole extent. And so considered, it is clear, that these sureties cannot found any claim to be discharged from the mortgage upon any thing contained in the agreement of the 26th of May, 1828.

The defendants moreover object, that supposing they are wrong as to the time when the mortgage might have been foreclosed, then the plaintiff cannot have, under this bill, relief of any kind; because he has instituted his suit before his debt became due; and that if this injunction were to be made perpetual, they would be tied up indefinitely and thrown at the mercy of the plaintiff without the possibility of relieving themselves in any way whatever.

Where a debt, secured by a mortgage, is made payable by instalments, it is well settled, that the mortgage becomes forfeited by the non-payment of the first instalment, and may be foreclosed immediately after that time. If a bill be filed for that purpose, the debtor may, however, prevent a foreclosure, or sale, by paying the instalment then due; but if he fails to do so, then the mortgage may be entirely foreclosed; or so much of the property may be sold as will satisfy the sum due at that time; and the decree will be allowed to stand as a security for the other instalments as they become due; as in case of a judgment at law for an annuity. But if the mortgaged property cannot be conveniently or safely sold in parcels, then it must be disposed of entire, and the whole debt raised and paid, with a rebate of interest on the sums not due

at the time of paying over the proceeds of sale to the creditor. This is done from necessity, and as an unavoidable consequence of the peculiar nature of the case. (*t*)

It is also well established, that if the mortgagor, who holds the possession, commits waste ; or, in any manner attempts to diminish the value of the property ; or, where it consists of personalty, is about to remove it beyond the reach of his creditor, so as to render it unequal to the discharge of the debt, or to place it so as not to be forthcoming for the satisfaction of the debt, he may be restrained by injunction. And an injunction for such a purpose may be obtained at any time before the debt becomes due ; for, otherwise, a fraudulent mortgagor might, at his pleasure, deprive the creditor of all benefit from his mortgage. Upon this ground this injunction was granted and now reposes. (*u*)

It is clear, that this mortgage could not have been foreclosed at the time the bill was filed ; because the credit given had not then expired ; and, therefore, *Salmon* could not then have asked for more than he has prayed for ; that is, to have the property placed under the protection of an injunction from this court. And relief cannot now be extended to him beyond that of perpetuating the injunction heretofore granted. In a case situated like this, the plaintiff, before the debt became due, filed a bill praying for a sale and an injunction to stay waste. The injunction was granted ; and, on the coming in of the answer, was, on a motion to dissolve, continued to the final hearing. After the mortgage debt became due the mortgagee filed another bill praying for a sale. To which it was objected by the defendant in his answer, that there was another suit then depending embracing the same subject. But I considered the first as a mere injunction bill, on which there could have been no decree for a sale, and as not, at all, inconsistent with the second bill on which I decreed a sale accordingly. (*w*)

It was indispensably necessary, in this case, that the plaintiff should establish his title as he has done ; and also shew, that there was some debt unsatisfied ; for, if the mortgage had been found

(*t*) 2 Inst. 471 ; *Gladwyn v. Hitchman*, 2 Vern. 135 ; *Stanhope v. Manners*, 2 Eden, 197 ; *Ex parte Fisher*, 3 Mad. 160 ; *Brinkerhoff v. Thalhimer*, 2 John. C. C. 486 ; *Marshall v. Thompson*, 2 Mun. 412 ; *Campbell v. Macomb*, 4 John. C. C. 534 ; *Leveridge v. Forty*, 1 Mau. & Sel. 706 ; *Coates v. Hewit*, 1 Wils. 80 ; *Bonafous v. Rybot*, 3 Burr, 1370 ; *Judd v. Evans*, 6 T. R. 399 ; *Bac. Abr. tit. Debt, B* ; *Ridgely v. Lee*, 3 H. & McH. 94 ; *Sparks v. Garriques*, 1 Bin. 152.—(*u*) *Eden Inj.* 119.—(*w*) *Murdock's case*, 2 Bland, 461.

defective, or insufficient in its origin; or had been nullified by the fraud, or any improper act of the plaintiff; or had been fully satisfied, the plaintiff could not have had any foundation on which to call for the preservation and protection of property which never had been, or had ceased to be thus legally pledged for his benefit. The validity of the mortgage has been sustained, and it is in proof, that there is still a large amount of debt covered by it. These points having been investigated and determined, as a necessary basis for the decree now called for in relation to the injunction, must be considered as closed and finally concluded between these parties and those claiming under them, on any bill, which may be hereafter filed, either to foreclose, or to redeem. But it would be needless now to determine the exact amount of the debt due; and therefore I deem it unnecessary to say whether the sum received from *Penrice* by *Thomas Clagett*, or the house-rent, ought or ought not to be considered as parts of the mortgage debt, the amount of which it will be most proper to determine hereafter upon another bill. (x)

Neither of the parties to this suit can sustain any substantial injury from this injunction being made perpetual; because it will merely so guard the property pledged as to give to the plaintiff the full benefit of it, when he shall find it necessary, or be prepared to come here, and ask to have it applied to the satisfaction of his claim; and it will leave the defendants free to redeem and disengage it from the lien by which it is now bound, at any time that they may think proper to pay the debt. I shall therefore, by a decree *quia timet* (y) continue the injunction, so as to cover all the personal property now ascertained to be embraced by the mortgage; subject to the further order of the court, on either a bill to foreclose or redeem.

Whereupon it is DECREED, that the defendants be and they are hereby restrained and enjoined, as prayed by the bill of complaint, from selling, concealing, or removing beyond the jurisdiction of this court the negro men slaves named *Jack*, *Kitt*, *Adam*, &c. and four horses, &c. or any of them; or any other of the mortgaged property in the possession of the said defendants or any of them at the time the said injunction heretofore granted was served on them, until the further order of this court on any bill which may

(x) *Marshall v. Thompson*, 2 Mun. 412; *Sparks v. Garriques*, 1 Bin. 152.—

(y) *Nutbrown v. Thornton*, 10 Ves. 161.

be filed by the plaintiff to foreclose the said mortgage ; or on any bill that may be filed by the defendants to redeem the said property. And it is further *Decreed*, that as to the defendant *Richard H. Clagett*, the injunction heretofore granted is hereby dissolved ; and that the bill of complaint be and the same is hereby dismissed with his costs to be taxed by the register. And it is further *Decreed*, the defendants, other than the said *Richard H. Clagett*, pay all the costs of this suit, not heretofore ordered to be paid by the plaintiff, to be taxed by the register.

From this decree the defendants appealed, and it was affirmed.
5 G. & J. 314.

WAMPLER v. SHIPLEY.

A trustee appointed to sell property cannot be allowed to abandon any right arising out of the sale after it has been ratified ; or to dispose of the purchase money in any way without the previous sanction of the court.

THIS was a creditor's bill filed on the 14th of October, 1813 ; upon which on the 25th of April, 1816, a decree was passed directing a sale of the real estate of *Duncan Shipley*, deceased, to pay his debts. The trustee reported several sales which were ratified. And by a further report, filed on the 21st instant, and now submitted for the order of the Chancellor, the trustee states, that as a part of the real estate of the late *Duncan Shipley*, he had heretofore sold a small piece of land supposed to contain ten acres, for three dollars and a quarter an acre, amounting to \$33 31 $\frac{1}{4}$, to *Seth Warfield*, who gave his single bill with two sureties for the payment of the purchase money ; that the sale had been ratified ; and after the purchase money became due, he had sued *Warfield* and his sureties for the debt, by warrant before a justice of the peace ; who upon hearing the case was satisfied, as this trustee was informed and believes, that there was either no land at all included in the certificate of sale given by said trustee, or at most not more than three or four acres to which there was any title or claim in said trustee ; and, therefore, there was, in his opinion, a total failure of consideration, and he gave judgment of *non pros* against this trustee, with costs ; which this trustee paid, amounting to one dollar. Whereupon the trustee prayed to be allowed the costs so paid to him ; that the sale be rescinded, &c.,

especially as he, this trustee, inquired into the facts and circumstances, and was satisfied as to the truth of there being almost a total deficiency of the land sold.

28th January, 1831.—BLAND, *Chancellor*.—This case involves so small an amount of property, that I have felt strongly inclined to make the cheapest and most summary disposition of it, that the established course of the court would permit. But even in an apparently trifling matter, I cannot allow myself to depart from general rules, where reason and all my experience here have demonstrated, that they should be rigidly adhered to, as well for the security of suitors as for saving the court itself from confusion and difficulty in the discharge of its duties.

This court, in ordering a sale of property, never warrants a title to the vendee. If there be any fraud, mistake, or misapprehension in the sale, this court itself, and none other, grants the relief; and if the land be sold by the acre, the quantity is always ascertained by a survey under its authority. But I never have, nor can admit, that a trustee, after the sale has been ratified, shall be allowed, in any manner, of himself and without the previous express authority of this court, to compromit, or abandon any right in relation to the sale so made, or to relinquish the bond, bill, or note taken for the purchase money, or to dispose of the property, or purchase money to any one, or upon any ground whatever. And moreover, I never have nor can admit, that any court of common law, or concurrent court of equity, much less a justice of the peace, should undertake to pronounce, in a suit upon a bond, bill, or note taken to secure the purchase money of a sale made under the authority of this court, that the consideration of such instrument had in part, or altogether failed; because of some fraud, or mistake in the proceedings of this court, or its trustee. If any trustee, or judicial authority, other than the Court of Appeals, were to be suffered, upon any ground or pretext, thus to thwart the regular course of this court, some of its most important proceedings might be paralyzed or perverted; and the injury to its suitors would be incalculable. Therefore, although the amount of value involved in this case is exceedingly small, I cannot permit myself, in any way, to tolerate or sanction what has been done by this trustee and the justice of the peace.

Whereupon it is *Ordered*, that the said report of the trustee filed on the 21st instant, be, and the same is hereby dismissed with costs to be taxed by the register.

HEWITT'S CASE.

Where it is charged in the bill, that the defendant is in custody as a lunatic, it is of course for his committee to answer for him; but if the committee be interested in the matter in controversy, then the lunatic must have a guardian appointed for him.—This court has jurisdiction to make partition of real and personal estate; but if the personal estate be in the hands of an executor or administrator, it must, in general, be distributed under the direction of the Orphans Court.

THIS bill was filed on the 22d of January, 1831, by *Eli Hewitt* against *Rezin D. Hewitt* and *Jacob Hewitt*; it states, that *Eli Hewitt* died in June, 1827, intestate, leaving these parties his children and heirs at law, that at the time of his death he was seised in fee simple of certain real estate, and possessed of some chattels real, which being in themselves incapable of division, it was prayed, that they might be sold and the proceeds divided among these parties. But it was further stated, that the defendant *Jacob Hewitt*, had, by a commission from this court, been found a lunatic; and that the other defendant *Rezin D. Hewitt*, had been appointed his trustee, in whose custody he then was as a lunatic; upon which it was prayed, that by a special order, the defendant *Rezin D. Hewitt*, might be authorized to answer for him. And to obtain the opinion of the Chancellor upon this latter prayer, the bill was at once submitted to him.

26th January, 1831.—BLAND, Chancellor.—Where a defendant has been found a lunatic by a regular commission, and is then in custody as such; and it is so stated, as in this instance, it is a matter of course for him to answer by his committee, without any special order for that purpose; but here it appears, that the lunatic's committee is interested in the subject in controversy; and, therefore, it becomes necessary to appoint a disinterested, capable person as his guardian, to answer for him. (a) *Subpœnas* may issue in this case, as of course, against both the defendants; but no further proceedings can be had, as against the lunatic, until he has a guardian appointed for him who will consent to act as such, and take charge of his interests. The Chancellor will expect to have some suitable person described and recommended to be guardian to the defendant *Jacob Hewitt*.

Whereupon it is *Ordered*, that this case stand over as to the defendant *Jacob Hewitt*, until further order.

(a) 2 Mad. Chan. 333; *Lloyd v. —*, 2 Dick. 460; *Lyon v. Mercer*, 1 Cond. Chan. Rep. 182.

The defendant *Rezin D. Hewitt*, by his answer, admitted, that the property in the bill mentioned was incapable of division; and therefore prayed, that it might be sold. And at the same time the solicitor of the parties recommended *Doctor Haines Goldsborough*, of Anne Arundel county, as a suitable person to be appointed as guardian of the lunatic defendant.

12th February, 1831.—BLAND, Chancellor.—Ordered, that *Doctor Haines Goldsborough*, of Anne Arundel county, be, and he is hereby appointed guardian of the said defendant *Jacob Hewitt*, a lunatic, with full power and authority to answer the said bill of complaint in his behalf, and in all respects to defend and sustain his rights and interests so far as the same may be involved in this suit.

After which the lunatic defendant, by *Goldsborough* his guardian, answered, that he believed it would be to his advantage, that the property mentioned in the bill of complaint, should be sold.

12th March, 1831.—BLAND, Chancellor.—The special and distinctly expressed object of this bill is to obtain a partition of an intestate's estate among his heirs. There can be no doubt, that this court has jurisdiction to make partition of real estate claimed either by descent, or by purchase; (b) nor can it be doubted, that this court has the power to make partition of any personal property among its several owners; for indeed it has been said, that a partition of personal estate can only be enforced by a court of equity. (c) But this bill does not allege that these parties, or any of them, are at present in actual possession of the chattels real of which the intestate died possessed; on the contrary, it has been verbally admitted, that these chattels real passed into the hands of his administrator; and yet remain to be accounted for by him. The administrator of the intestate has not been made a party to this suit; nor could he, with propriety, have been made a party solely for the purpose of obtaining a partition of any of the personal estate in his hands; because the power to make a distribution of the surplus of the personal estate remaining in the hands of his administrator has been conferred upon the Orphans Court; with which this court should not interfere; except on account of some special circumstances to which the powers of the Orphans Court may not be altogether adequate. Nothing of the sort has

(b) *Corse v. Polk*, 1 Bland, 233, note; 1831, ch. 311, s. 7.—(c) *Smith v. Smith*, 4 Rand. 95; *Crapster v. Griffith*, 2 Bland, 25.

been intimated in this case; and therefore, as to the chattels real, mentioned in the bill, these parties must be referred to the Orphans Court to obtain the proper distribution.

DECREED, that the real estate mentioned in the complainant's bill, be sold; that that part of the complainant's bill which relates to the chattels real therein mentioned, be, and the same is hereby dismissed; that *Eli Hewitt* and *Rezin D. Hewitt*, be, and they are hereby appointed trustees to make sale of the real estate, &c.

A sale was made accordingly, and the proceeds distributed.

WILLIAMS' CASE.

How far the court has gone, upon general principles, or has been authorized to go, by general or special legislative enactment, in applying the principal of an infant's estate to his maintenance and education.—The acts of Assembly which authorize the sale of the real estates of infants considered as to their true construction, their practical utility, and their constitutionality.—Where the widow herself is the petitioner her separate assent to a sale is not required.—The credit given on the sale of an infant's real estate considered as an investment for his benefit.—A bid may be reserved, or a bye-bidder allowed in certain cases.—An estate ordered to be sold is under the protection of the court, and may be rented until a sale can be effected.

The various cases in which it may become necessary to put a present value upon a life interest in property.—The formation of tables shewing the expectation of human life at every age.—In ascertaining the present value of a life interest, and in apportioning a burthen between the tenant for life, and the remainderman or reversioner, the estimate must be made from a consideration of all circumstances, in which assistance may be derived from tables shewing the expectation of life.—The tenant for life must keep down the interest of the debt with which the estate is encumbered.—The census of this and other countries as shewing the increase of population, and the probability, and the expectation of human life.—The assessment laws and the constitutional rule which requires every one to contribute his proportion of public taxes according to his actual worth in property considered with reference to the valuation of life interests.—The rule of this court according to which allowances are made to widows in lieu of dower, its origin and errors considered.—The legislative rules, and the rules of the court by which the value of life interest are to be adjusted.—The value of a life interest should be made as of the day when it is taken away.—Where a life interest is extinguished by a sale, or the like, its equivalent then vests in the tenant for life; and, after his death, will go to his assignee or legal representative.

Susan F. Williams, widow of *William E. Williams*, and guardian of his four infant children and heirs at law *Elizabeth C. Williams*, *William S. Williams*, *Mary S. Williams*, and *Otho H. Wil-*

liams, on the 18th of April, 1827, filed her petition, in which, as amended, she set forth, that her wards were seised of a valuable farm, in Frederick county, called *Ceresville*, containing about five hundred and twenty acres; and also of a tract of woodland, in the same county, containing about one hundred and twenty acres; which property, from its character, required the constant superintendence of an active man to render it profitable, which the petitioner was incompetent to bestow. That the dwelling-house and other buildings were then considerably out of repair, and would require a large expenditure to put them into proper tenantable condition. That the rent of the farm was much reduced by taxes, repairs, and other incidental charges. That the infants, who were all between fifteen and eight years of age, had no other source of revenue than the farm, the net rent of which was insufficient for their maintenance and education; and that the amount for which the estate would sell, by a judicious investment of it, would yield the infants an income nearly three times greater than its net rent—whereupon she prayed, that to ascertain the actual condition of the property, and the advisableness of a sale, a commission might be issued according to the act of Assembly in such case made and provided.

With this petition, the petitioner nominated certain persons as commissioners; upon which on the 23d of November, 1827, a commission was ordered and issued accordingly.

The commissioners, in their return, filed on the 15th of February, 1828, reported, that they had proceeded to view and examine the farm called *Ceresville*, situate about four miles from the city of Frederick, containing five hundred and twenty acres, more or less, including all the improvements; viz: the dwelling-house and out-buildings appertaining thereto; the farm or overseer's house, barn, wagon-house, corn-house, dairy, negro quarters, sheds, &c. &c. Blacksmiths' shops, ferry, dwelling occupied by the ferryman; a three story stone mill, saw-mill, miller's dwelling-house and out-houses, a two story stone store-house, together with all other buildings and improvements thereunto belonging; and, by the most competent evidence they could procure, ascertained the real value of the said property, taking into consideration the quality, location and improvements thereof, and all the advantages and disadvantages attending the same, to be thirty-nine thousand dollars, or seventy-five dollars per acre. That they had also proceeded to examine and value a tract of woodland containing one hundred and seventy acres, more or less, situate in what is generally known

by the name of *The Hills*, and about two miles from *Ceresville*, which land had been reserved for the use of the said farm, to be worth two thousand five hundred and twenty-five dollars, or fifteen dollars per acre. To account for the apparent difference in value of the above named tracts of land they observe, that this latter tract was only valuable for the wood thereon; that it was without improvements, and almost valueless for all purposes of cultivation.

The commissioners further reported, that after full and mature consideration of every thing connected with the property; and the infant owners thereof, they were decidedly of opinion and so determined, that a sale of said farm and improvements thereon, and the one hundred and seventy acres of woodland in *The Hills*, would be to the interest and advantage of the infants; and they submitted the following reasons upon which they had principally founded their opinion and judgment.

First. They considered the location of *Ceresville* unfortunate as regards roads and water courses; and, they thought, shewed distinctly and strongly how necessary it was, that it should be under the management of a vigilant, industrious and keen-eyed proprietor. If this be the fact, which none can doubt who know the property, it consequently followed, that it must be an unprofitable estate to the infants who then owned it; and who must depend upon tenants to exercise that care and attention which it required. *Ceresville* was bounded on one side by the river Monocacy, and nearly so on the opposite one by Israel's creek; these streams, when overcharged with water, were extremely rapid, and often very destructive to fences on their margins. This farm had suffered very considerably by such overflowings within the last fifteen months. Again two of the most public roads in the county passed, at nearly right angles, through the farm, inviting trespass at every step, often subjecting the owner to loss; and always to the heavy and annual expense of keeping in repair a long line of fences on each side of those roads, in a country where the proper materials for making them were known to be very costly.

Secondly. The mills were liable to many of the objections against their tenure, by the infants, to which the farm was subject; and, in some respects, the objections were stronger. To carry on the milling business to any advantage a large capital, and full practical knowledge, were absolutely necessary; and to rent the mill, although a large nominal rent might be obtained, the immense deductions on account of repairs, regular and accidental, would reduce it to a very small net amount.

Thirdly. The infants were quite young, and would not be capable, for many years, of taking charge of the property. Two of them were females, and could not, even after their full age, personally and beneficially assume and direct the management of their estates.

Fourthly. The mother and guardian of the infants was not competent, by reason of her sex, her situation, and her inexperience in business to control and supervise the conduct of either properly, which its extensiveness, nature, and condition demanded.

And Fifthly. The property at that time would probably sell for as much as it would at any short future period; and the commissioners did not doubt, that if the proceeds were judiciously invested in public stock, the surplus interest, which would remain after the deduction of an annual sum sufficient for the maintenance and education of the infants, would more than equal any advance in the value of the property which coming years might bring.

Upon this report of the commissioners the case was submitted without argument.

24th May, 1828.—BLAND, *Chancellor.*—Before we proceed to the consideration of this case, it may be well, for the better understanding of the whole matter, to advert to the law as it before stood, as well as to some of the special estate acts, which the General Assembly had been induced to pass in relation to similar cases before the passage of the general acts under which this case has been brought before the court.

Among the various rights which an owner may exercise over his property is that of directing, by his contract, his will, or otherwise, that his real estate shall be converted into personalty, or that his personalty shall be converted into realty. This right of conversion, however regarded at law, has long, in equity, been held to be a well established incident to every absolute ownership. And as equity considers that which has thus been directed to be done as having actually been done, in every case, except in dower; (a) it thenceforward, and, for almost all purposes, treats the estate as being, in the eye of equity, real or personal according to the character which its owner has thus stamped upon it. The exercise of such an act of ownership gives rise to a variety of principles, in relation to property so disposed of, (b) the

(a) *Crabtree v. Bramble*, 3 Atk. 687.—(b) *Doughty v. Bull*, 2 P. Will. 320; *Lechmere v. Carlisle*, 3 P. Will. 211; *Thornton v. Hawley*, 10 Ves. 129; *Ashby v. Palmer*, 1 Meriv. 296.

existence of which it may be well to recollect, although none of them need now be particularly noticed further than as they may be illustrative of the analogous consequences in cases of a similar conversion made without the consent of the owner.

Here the inquiry is as to the extent of the power of the Court of Chancery over the property of infants. It is admitted by all, that a guardian or trustee cannot merely as such make an absolute and total change in the nature of an infant's estate; and also, that the Court of Chancery can direct or sanction no alteration whatever, in the nature of an infant's estate, which his guardian or trustee might not of himself lawfully make. (c) In general, the court will not suffer the personal estate of an infant to be, in any way, changed into real; or his real estate to be converted into personalty. For the alteration of property is as far as possible to be avoided consistently with the idea of preserving the interests of the proprietor. (d) But, apart from this general rule, there are many cases in which the court will, for the manifest convenience and advantage of the infant, direct or sanction the making of an absolute purchase of real estate with his personalty, or with the rents and profits or proceeds of his estate; and thus, in fact, convert his personalty into realty. This, however, is never done without a complete saving to the infant of all his rights by continuing to consider, during his infancy, the property as personalty to the same extent as before such conversion was made. Because the court can neither do nor sanction any act which may, in its consequences, impair the rights of the infant, or those who may claim under him, either by altering the nature of his property; (e) or by changing his domicile so as to cast it into a different course of succession. (f) But in the conversion of an infant's personalty into realty, by clearing off incumbrances, he being, in respect of such real estate, liable as debtor, so that, as in fact the debtor himself pays the debt, there

(c) *Inwood v. Twyne*, Amb. 417; *S. C. 2 Eden*, 148; *Lee v. Brown*, 4 Ves. 363.—
 (d) *Rook v. Worth*, 1 Ves. 461; *Ex parte Bromfield*, 1 Ves., jun., 460; *Oxenden v. Compton*, 2 Ves., jun., 73.—(e) *Winchelsea v. Noreliffe*, 1 Vern. 435; *Witter v. Witter*, 3 P. Will. 99; *Kirk v. Webb*, Prec. Chan. 84; *Terry v. Terry*, Prec. Chan. 273; *Mason v. Day*, Prec. Chan. 319; *Pierson v. Shore*, 1 Atk. 480; *Sergeson v. Sealey*, 2 Atk. 413; *Maynwaring v. Maynwaring*, 3 Atk. 414; *Rook v. Worth*, 1 Ves. 461; *Inwood v. Twyne*, Amb. 417; *S. C. 2 Eden*, 148; *Gibson v. Scudamore*, 1 Dick. 45; *Oxenden v. Compton*, 2 Ves., jun., 73; *Ashburton v. Ashburton*, 6 Ves. 6; *Ware v. Polhill*, 11 Ves. 278; *Ex parte Phillips*, 19 Ves. 120; *Webb v. Shaftsbury*, 6 Mad. 100.—(f) *Somerville v. Somerville*, 5 Ves. 750; *Pottinger v. Wightman*, 3 Meriv. 68; *Desesbats v. Berquier*, 1 Bin. 336.

is not nor need be any saving of his rights. (*g*) Nor, upon the same ground, is there any saving of the infant's rights, where his personalty is applied to the keeping in repair of the edifices upon his real estate. (*h*)

On the other hand there are cases in which, that which is ordinarily and technically considered as a part of the real estate of an infant may be converted into personalty; that is, the timber or mineral part of the inheritance may be sold and converted into personalty. (*i*) But the various kinds of perennial vegetable growth, such as timber standing upon the land, like coal and other minerals of which the soil itself may be, in part, composed, are, all of them, although legally held to be, while resting in their natural positions, a part of the realty, in many respects more properly regarded as the mere products of the land; to be gathered as portions of the rents and profits of the inheritance, as much so as corn, or any other of the industrial fruits of the earth, the taking of which timber or mineral products not being properly a conversion, but only a mode of enjoyment and perception of the profits of the estate; (*j*) and like all rents and profits derived from the inheritance, when so taken, must be regarded as personalty. (*k*) So considered the selling of timber or coal from the land of an infant can, with no more propriety, be regarded as a conversion of his real estate into personalty, than the selling of its annual crops of grain or tobacco.

All the cases to be found in the English books which speak of the conversion of an infant's *real* estate into personalty, merely for his advantage and convenience, are cases which relate to nothing more than the timber and mineral part of the inheritance. For it has been distinctly declared, that there is no instance of binding the inheritance of an infant by any discretionary act of this court; that as to personal things, as in the composition of debts, it has been done; but never as to the inheritance, for that would be assu-

(*g*) *Dennis v. Badd*, 1 Chan. Ca. 156; *Ex parte Grimstone*, Amb. 706; *Shrewsbury v. Shrewsbury*, 3 Bro. C. C. 125; S. C. 1 Ves., jun., 233; *Chetwynd v. Fleetwood*, 4 Bro. P. C. 435.—(*h*) *Ex parte Ludlow*, 2 Atk. 407; *Ex parte Simon Degge*, 4 Bro. C. C. 238, note; *Oxenden v. Compton*, 2 Ves., jun., 73.—(*i*) *Rook v. Worth*, 1 Ves. 461; *Anandale v. Anandale*, 2 Ves. 383; *Tullit v. Tullit*, Amb. 370; *Ex parte Ludlow*, 2 Atk. 407; *Ex parte Bromfield*, 1 Ves., jun., 462; S. C. 3 Bro. C. C. 510; *Oxenden v. Compton*, 2 Ves., jun., 70; S. C. 4 Bro. C. C. 231.—(*j*) *Chandos v. Talbot*, 2 P. Will. 606; *Story v. Windsor*, 2 Atk. 630; *Pulteney v. Warren*, 6 Ves. 89; *Rook v. Worth*, 1 Ves. 461; *Tullit v. Tullit*, Amb. 370; *Oxenden v. Compton*, 2 Ves., jun., 70; S. C. 4 Bro. C. C. 231; *Ex parte Phillips*, 19 Ves. 119; *Stoughton v. Leigh*, 1 Taunt. 402.—(*k*) *Bertie v. Abingdon*, 3 Meriv. 568.

ming a legislative authority, the doing of that which is properly the subject of a private act of parliament. (*l*) Nor have I been able to find any case in the English books in which the court has undertaken to change the nature of an infant's inheritance by selling the land itself, and investing the proceeds of the sale for his benefit; or in which the court has sanctioned any such sale made by the guardian or trustee of an infant.

In the management of a lunatic's estate, in England, looking to his maintenance and the payment of his debts, if the court sees that his advantage would be promoted by selling a part of his real estate, inconvenient, ill conditioned, &c. for these purposes, it would have no difficulty in doing so without making any saving of his rights over the property into which it had been converted; (*m*) such as is here made by our acts of Assembly when a sale is made of a lunatic's real estate for his maintenance, &c. (*n*) But where, under our act of Assembly, a portion of an infant's real estate is required to be sold to save his personalty, no saving is directed to be made for the benefit of any one. (*o*)

In England the conversion of an infant's personal into real estate, by the purchase of lands, has been rarely or ever prohibited by the court, when made with a proper saving of the infant's rights; because of the great additional security which is thus given to his property. Such a conversion is regarded as a permanently safe investment of the infant's personalty; which, with due care, may always be made without loss, and can seldom fail to be advantageous to him; (*p*) particularly during the prevalence of those epidemic speculation fevers, which for some seasons have been attended with such frightful ruin in Europe; (*q*) and have many times spread so much confusion and distress over our country. (*r*) It is declared, however, that all changes in the nature of an infant's property should be avoided as far as practicable; and that none should be made without an entire saving of his rights; or whereby

(*l*) *Taylor v. Philips*, 1 Ves. 229; *S. C.* 2 Ves. 23; *Belt's Supp.* 120, 253; *Harvey v. Ashley*, 3 Atk. 613; *Russel v. Russel*, 12 Cond. Chan. Rep. 258; In the matter of —, a minor, 12 Cond. Chan. Rep. 259; *Mackworth's case*, 1 Vern. 461.—(*m*) *Ex parte Phillips*, 19 Ves. 123.—(*n*) 1785, ch. 72, s. 6; 1800, ch. 67, s. 5; 1828, ch. 26, s. 3; 1829, ch. 222; 1833, ch. 150.—(*o*) 1818, ch. 193, s. 8; *Waring v. Waring*, 2 Bland, 676.—(*p*) *Doughty v. Bull*, 2 P. Will. 320; *Terry v. Terry*, Prec. Chan. 273; *Inwood v. Tyne*, 2 Eden, 143; *Webb v. Shaftsbury*, 6 Mad. 100.—(*q*) *Chambers v. Chambers*, Fitzgib. 127; *S. C.* Mosely, 333; *Terry v. Terry*, Prec. Chan. 274; *Harrison v. Hart*, Comyns, 394; *Rees' Cyclo. art. John Law*; *Collyer on Partnership*, 618; *Chalmer v. Bradley*, 1 Jac. & Walk. 59.—(*r*) *Hoye v. Penn*, 1 Bland, 41, note.

his estate might be deteriorated, or exposed to any new and additional perils. Thus demonstrating, that, in England, no court of justice has ever presumed, for any purpose of general advantage merely, however plausible or apparently safe, to interfere with the right of property of an infant, or indeed of any one. And it also appears, that in those cases where the parliament in the plenitude of its sovereign power has directed any such alteration of property to be made, it has most usually done so with a saving of the rights of its infant owner. (*s*)

In England there are many modes of investing money, other than by the purchase of real estate, so as to preserve it in perfect safety, and yet keep it constantly productive. In this country it is not so. There are here comparatively few, or, perhaps, no such perfectly safe and productive forms of investing money, other than by the purchase of land, or upon the mortgage of real estate, as in England; and therefore, considering the peculiar circumstances of our country, the conversion of an infant's personal estate into realty, by way of a permanently safe investment, is much more obviously justifiable or even commendable here than in England. (*t*)

On the other hand, apart from those kinds of conversion of the realty into personalty, by the sale of timber, coal, &c. it is, upon the same consideration, evident, that, in this country, no investment can be any thing like so safe as in land to which there is a clear title; and that the conversion of a clear fee simple estate in land can never be made with any prospect of placing the fund in the same degree of absolute security, or without incurring some expense and loss, such as costs and commissions; and can rarely be so completed as to result in any general and permanent advantage to the infant. Consequently, there being no shadow of authority to be found in the English books, it would be difficult here to find any tenable ground upon which a court of justice could sustain itself in making a conversion of an infant's real estate into personalty; or in so dealing with it, upon the pretext of its being for his advantage as to diminish its value, or to subject it to any new and additional perils. (*u*)

In mortgage cases it is, however, said, that the court will order an infant's real estate, that is, regarding his equity of redemption

(*s*) *Anandale v. Anandale*, 2 Ves. 383; *Oxenden v. Compton*, 4 Bro. C. C. 235, note; *Oxenden v. Compton*, 2 Ves., jun., 77.—(*t*) *Ringgold's case*, 1 Bland, 26.—(*u*) *Doughty v. Bull*, 2 P. Will. 320; *Partridge v. Dorsey*, 3 H. & J. 307, note, 322.

as such, to be sold for his peculiar benefit and advantage. But the advantage of a sale of the realty, in such cases, is most manifest; for, if, instead of ordering a sale, the court were to pass a decree of foreclosure, the whole estate would be lost to the infant; whereas, if it should be worth more than the mortgage debt, by a sale, the surplus would thus be saved, and returned to him. Hence it is obvious, that in all such cases the infant, by a sale, may gain but cannot lose; and therefore the sale, or conversion of such real estate into personalty for the payment of the debt must be advantageous to him. (*w*)

(*w*) *Goodier v. Ashton*, 13 Ves. 83; *Monday v. Monday*, 1 Ves. & Bea. 223; *Brookfield v. Bradley*, 1 Cond. Chan. Rep. 295; *Scholefield v. Heafield*, 11 Cond. Chan. Rep. 528; *Powel Mort.* 983, 985.

JONES v. BETSWORTH.—This bill was filed on the 3d of September, 1795, by Thomas Jones against Samuel Betsworth, for the recovery of a mortgage debt by a sale of the mortgaged property. The defendant answered, and the case was brought on for a final hearing.

17th January, 1798.—HANSON, *Chancellor*.—The said cause standing ready for decision, and being submitted; the bill, answer and all other proceedings were by the Chancellor read and considered; and it appearing to him, that the mortgage in the bill mentioned was duly executed, that there is due to the complainant, on the said mortgage, the sum by him stated to be due, with interest from the time of settlement; that it is reasonable to have the said sum, with interest and costs, raised by a sale of the mortgaged lands; unless the defendant, within such time as shall be allowed by this court, shall discharge the said principal, interest and costs.

It is thereupon *Decreed*, that unless the defendant, on the 9th day of February, 1799, shall bring into this court to be paid to the complainant, or shall pay to the complainant the costs of this suit, and the sum of £771 18s. 1d., which is the sum to be then due for the said principal of £777 19s. 2d., with interest from the 9th day of May, 1793, deducting the sum of £274 9s. 0d., paid on the 30th day of April, 1794; or unless the said defendant shall at any time before the said 9th day of February, 1799, bring into this court to be paid to the complainant, or pay to the said complainant, his costs of suit, together with the aforesaid sum of £777 19s. 2d., with interest as aforesaid, until the time of bringing in, deducting the payment as aforesaid, made on the 30th of April, 1794, the mortgaged lands, viz: *Betsworth's Choice*, 52½ acres; *Providence*, 215½ acres; *Colepit*, 50 acres; *Balldridge*, 80 acres; and another tract, 2½ acres, lying in Somerset county, or so much thereof as shall be necessary, shall be sold for discharging the aforesaid principal, interest and costs. And Lambert Hyland, of said county, is hereby appointed trustee, &c. And the terms of sale shall be that the purchase money, at the election of the purchaser or purchasers, shall either be paid down to the trustee immediately after the sale, or be brought into this court, or paid to the said trustee immediately after the Chancellor's ratification of the sale, which cannot be absolutely valid until ratified by the Chancellor, &c.

In consideration of the defendant's allegation on oath, respecting the value of the lands, and of the payment by him made, as stated by the complainant, the Chancellor has allowed a considerable time, as is usual in such cases, for paying or bringing in the principal, interest and costs, before the sale for ready money can take place. It is to be remarked, that it is not in the Chancellor's power, without

And so too real estate in the hands of an infant heir or devisee may, in various other modes of judicial proceeding be converted

the consent of the complainant, to direct a sale of mortgaged land on credit, (1785, ch. 72, s. 3;) although it appears to him probable, that an immediate sale on short credit may be more advantageous to both parties than a sale for ready money after a considerable lapse of time.

It is therefore further *Decreed and Provided*, that in case the complainant and defendant shall each subscribe a writing expressing his consent to the sale of the aforesaid lands on a credit of six months, the said trustee, after filing his bond and giving notice as aforesaid, may proceed with all diligence to a sale of the lands, either in one lot or parcels as aforesaid, at public auction, on the terms of the purchaser's giving bond to the said trustee, as such, for paying the purchase money with interest, within six months from the time of sale. And if a sale on credit shall take place agreeably to the directions of the decree, the trustee shall, in every respect, pursue the directions herein before given relative to the return execution of a deed, and bringing money into court. He shall likewise return to this court the bond or bonds by him taken, and the writing expressing the consent of the parties to the sale on credit.

Immediately after signing the above as the decree, the following was subjoined:
 17th January, 1798.—HANSON, *Chancellor*.—It appears on examination, that a mistake hath been made with respect to the debt to be due on the 10th of February next. However, the mistake could not be material, unless the defendant should actually bring the money into court on the said day without any discovery of the mistake. For in case the defendant shall not offer to bring in on that day, it appears by the decree, that the sum to be raised by a sale is £777 19s. 2d., with interest from the 9th of May, 1793, after deducting £271 9s. 0d., as paid 30th of April, 1794. The sum to be due on the 10th of February next, is £706 19s. 5d.

After which a sale of the mortgaged property having been made and reported; and the usual order allowing cause to be shewn why it should not be confirmed having been published, the case was again submitted.

27th March, 1800.—HANSON, *Chancellor*.—No objection having been made to the sale of the trustee Lambert Hyland, although notice, &c.; and the complainant having by writing expressed his approbation; it is *Adjudged and Ordered*, that the said sale made by the said trustee, as stated in his report, be and it is hereby absolutely ratified and confirmed.

It is further *Ordered*, that the said trustee for his whole trouble and expense, incurred in the execution of his trust, be allowed the sum of thirty pounds, out of the money to arise from the sale; that the sum of £20 12s. 1½d., be applied to the discharge of costs as taxed by the register of the court; that the residue of the said money be paid to the complainant Thomas Jones, towards the discharge of the debt to him due on the mortgage stated in the bill. But as the complainant is the purchaser of the land sold, and passed his bond for the purchase money, there is no necessity for the money to be actually paid. And it is *Ordered*, that on his giving his receipt in writing to be here lodged, for the said residue, and on paying to the said trustee the said sum of thirty pounds, the said bond shall be given up to him to be cancelled, and the said trustee shall execute to him a deed, as by the original decree is directed.—M. S.

into personalty for the payment of debts; in all which cases, the surplus, if any, goes as a residuum of the realty to the heir or

A mortgage to secure the payment of money, being a creature of equity, can only be correctly understood according to those equity principles by which the contract is regulated. It having been assumed in regard to such a security, that the creditor might be sufficiently reimbursed by the payment of the principal of the debt, with legal interest, at any time after the day of payment, when, according to the terms of the contract, the condition having been broken, and the estate at law having thereby become absolute, it followed, that, in equity, the debtor might, within a reasonable time, redeem his estate on the payment of the principal of the debt, with interest; and that as the debtor might be allowed, on those terms, to redeem, the creditor could not, after the day of payment, have his estate made perfectly absolute without a bill to foreclose, the court of equity, to which he was thus under a necessity of addressing himself, for that purpose, might prescribe the terms upon which his title should be made absolute; which, among other things, should be, that the debtor should have a further specified time, after the date of the decree, to pay the debt, with interest; and so redeem his estate; and this specified time, on its being shewn that the mortgaged estate greatly exceeded in value the amount of the debt, might, to prevent a sacrifice of the property, be from time to time enlarged to a reasonable extent.—(*Pow. Mortg.* 7, 108, 250, 961; 2 *Mad. Chan.* 492; *Ismoord v. Claypool*, 1 *Cha. Rep.* 262; *Monkhouse v. The Corporation of Bedford*, 17 *Ves.* 380; *Novosielski v. Wakefield*, 17 *Ves.* 418; *Edwards v. Cunliffe*, 1 *Mad. Rep.* 286; *Parker v. Housefield*, 8 *Cond. Chan. Rep.* 63; *Bruere v. Wharton*, 10 *Cond. Chan. Rep.* 158.)

Such has always been the law of England; and in Maryland the same principles of equity have prevailed, in so far as to allow, for the same reasons, on a decree to foreclose or sell, the further time of twelve or eighteen months to the debtor to make payment.—(*Carroll v. Belt*, 1797; *Burt v. The Commissioners of Washington*, 1806; *Craig v. Rusk*, 1807.)—But as I never could satisfy myself of the propriety of thus extending the credit beyond the date of the decree, to the prejudice of the creditor, to whom mere legal interest could rarely be an adequate compensation for the delay of the payment of his money; (*Reynolds v. Pitt*, 19 *Ves.* 140;) and no such further indulgence being allowed to the debtor in mortgage cases any where but in England, where the practice of granting it has been regretted, and said to be unreasonable.—(2 *Mad. Chan.* 492.)—I have in all cases deemed it proper to limit the indulgence to one month, or to as short a time as was compatible with the observance of the rule, as one which had been expressly recognized by the General Assembly; (1785, *ch.* 72, s. 3;) since there can be no more just grounds for postponing the immediate execution of a decree in equity for the recovery of a debt in a mortgage case, than in suspending execution on a judgment at common law, in an action of debt on a bond under a stay law, which has been held to be unconstitutional, because of its impairing the obligation of the contract.—(*Campbell's Case*, 2 *Bland*, 237.)

But, in regard to infants, it has been declared, that where any person under twenty-one years of age, shall be possessed of any real estate mortgaged for securing the payment of any debt, and the day of payment has elapsed, the Chancellor may decree a sale of the mortgaged premises, or such part thereof as may be necessary to discharge the debt; or may decree a foreclosure of the whole or such part of the mortgaged premises as may be sufficient to satisfy the debt; and that too, as it would seem, without allowing the infant a day to shew cause; or requiring the plaintiff, as formerly, to give bond to refund or reconvey, on its being made to appear within one year after his arrival at age, that the decree was erroneous or

devisee from whom the body of the realty was taken. (x) And upon a like ground of necessity to satisfy the just claims of others, in partition cases, where it is impracticable to make any just partition of the real estate, or where a partition cannot be made of it without much disadvantage, there, as well by the long established power of the court, as by positive legislative enactment, a real estate in which an infant has an interest in common with others may be sold, and a share of the proceeds of the sale, consisting of personalty, may be awarded to the infant. (y)

The courts of justice of England, acting in accordance with these general principles and holding the rights of property, particularly those of an infant, to be in all respects sacred and inviolable, but upon the ground of some great and overruling necessity, have cautiously abstained from meddling with all such rights in any way. And therefore it is, that the English Court of Chancery has never, except in the cases above mentioned, undertaken to dispose of an infant's land, or inheritance in real estate; and that, although many cases have arisen, in which the income of an infant's estate has been found to be entirely insufficient for his sup-

unjust.—(1785, *ch. 72, s. 1 and 2*; 1832, *ch. 302, s. 8*; 1837, *ch. 292*; *Booth v. Rich*, 1 *Vern.* 295; *Mallack v. Galton*, 3 *P. Will.* 352; *Winchester v. Bearor*, 3 *Ves.* 317; *Williamson v. Gordon*, 19 *Ves.* 114.)—And it has been further declared, without distinction as to infants or adults, that in all cases to foreclose, in case the party against whom the bill shall be filed does not pay the sum due, by the time limited in the decree, the mortgaged premises, or so much thereof as may be necessary to discharge the money due and costs, may be sold for ready money, unless the plaintiff shall consent to a sale on credit; and the money raised by such sale shall be ordered to be brought into court to be paid to the plaintiff.—(1785, *ch. 72, s. 3*; *David v. Grahame*, 2 *H. & G.* 94.)

It appears to have long been the understanding of the profession and of this court, as indicated in the above case of *Jones v. Betsworth*, and in other cases, that the proceeds of the sale of the mortgaged property should be first applied to the payment of the costs, commissions and expenses, and the balance only to the satisfaction of the mortgage debt; or discounted from the debt, should the mortgagee himself be the purchaser, leaving the mortgagee to proceed otherwise against the mortgagor for the recovery of so much of the debt as was thus left unsatisfied — (*Ridgely v. Bell*, 1805; *Murdock's case*, 2 *Bland*, 464, 468.)—But in England it is otherwise; there, according to a recent decision, the whole amount of the proceeds of the sale must be first applied to the satisfaction of the mortgage debt.—(*Upperton v. Harrison*, 10 *Cond. Chan. Rep.* 139; *Ellison v. Wright*, 3 *Cond. Chan. Rep.* 482.)

(x) *Culpepper v. Aston*, 2 *Chan. Cas.* 115; *Oxenden v. Compton*, 2 *Ves., jun.*, 73; *Maugham v. Mason*, 1 *Ves. & Bea.* 415; *Jones v. Jones*, 1 *Bland*, 452.—(y) 1785, *ch. 72, s. 12*; 1820, *ch. 191*; *Corse v. Polk*, 1 *Bland*, 233, note.

port; yet it has rarely occurred, that the court has broken in upon the capital of even his personal estate for the mere purpose of maintenance, though it has frequently done so for his education and putting him out in life. (2)

(2) *Barlow v. Grant*, 1 Vern. 255; *Franklin v. Green*, 2 Vern. 137; *Harvey v. Harvey*, 2 P. Will. 21; *Davies v. Austen*, 1 Ves., jun., 218; S. C. 3 Bro. C. C. 178; *Lee v. Brown*, 4 Ves. 362; *Walker v. Wetherell*, 6 Ves. 474; *Beasley v. Magrath*, 2 Scho. & Lefr. 35; *Ex parte Darlington*, 1 Ball & Bea. 240; *Ex parte M'Key*, 1 Ball & Bea. 405; *Ex parte Green*, 1 Jac. & Walk. 253; *Hooper v. Royster*, 1 Mun. 119.

HANSON v. CHAPMAN.—This bill was filed on the 8th of August, 1796, by Samuel Hanson and others against Henry H. Chapman. It states, that the late Samuel Hanson, by his will, bequeathed certain legacies to the plaintiffs; and on the death of his grand-daughter Anna H. Chapman, and his daughter Eleanor Chapman, without issue, directed that his real estate should be sold for the payment of those legacies. That he appointed George Lee and Henry H. Chapman, his executors, and authorized them to make the sale; that Lee had renounced the executorship, and it was doubtful whether Chapman alone could sell and make a good title; and that the testator's grand-daughter and daughter were both dead without issue. Prayer to appoint a trustee to make the sale, &c.

Henry H. Chapman, who alone was made defendant, answered, admitted the facts, and consented to a decree as prayed. Whereupon, it was, on the 8th of October, 1796, *Decreed*, in the usual form, that Henry H. Chapman make the sale, &c. Under which decree sales were made and ratified accordingly. After which, on a considerable amount of the proceeds being brought in, they were, by the direction of the court distributed among the legatees of full age.

11th September, 1801.—**HANSON, Chancellor.**—On the petition of several of the said devisees, it is *Ordered*, that the auditor state the sums of which each of them is entitled to out of the principal money arising from the said sale; and that he state the sum which each devisee is entitled to receive of the money brought into court, charging him or her with the payments already made to him or her. Out of the said money is to be deducted the trustee's commission, hereby allowed him of £175, exclusive of all except personal expenses. And in making these statements he is to take into consideration the specific and contingent legacies given by the said Hanson's will. It is the intent of this order, that if there be money brought in sufficient, after the aforesaid deductions, to pay unto each devisee of lawful age the proportion of the principal money to him or her due, the same shall be paid. The register is hereby directed to receive any money arising from the sale to be offered by the trustee; and, with the treasurer's leave, deposite the same in the Western Shore treasury, subject to future order. And it is the intent of this order, that the said money be brought into the account to be stated.

After which the case was again brought before the court at the instance of one of the infant legatees.

29th October, 1801.—**HANSON, Chancellor.**—It is represented to the Chancellor that William Baker, one of the children of Mildred Baker, daughter of the said Hanson, and mentioned in his last will, is nearly twenty years of age, and engaged in the study of physic; and that it will be of great importance to him to receive immediately the money to which he is entitled under his grandfather's will. The Chancellor being satisfied of the truth of the said representation, and that the inte-

By an act of Assembly, passed before the revolution, it was, among other things, expressly declared, that if the estate of an infant was so small, that its yearly profits and increase would not extend to a *free* education and maintenance of him, he should be bound apprentice to a trade until he arrived at full age; unless some relation or charitable person would maintain and educate him for the small increase of his estate, without any diminution of the principal. (a) Soon after the revolution, the Legislature declared, that in case the produce of the estate was not sufficient to maintain and educate the minor, in a proper manner, the Orphans Court might allow the guardian to apply a part of the principal of the infant's personal estate, not exceeding one-tenth annually, to the purpose of his education. (b) And, afterwards, by the testamentary system, it was declared, that the Orphans Court should ascertain the amount to be annually expended in the maintenance and education of the orphan; regard being had to his future situation, prospects and destination; and, if it should be deemed advan-

rest of the said infant will most probably be best promoted by permitting him to receive the said money wherewith he may advantageously prosecute his studies. It is *Ordered*, that there be paid to the said William Baker, the money to which, agreeably to the auditor's report, he is entitled, arising from the sale of the real estate of Samuel Hanson, deceased; and either here lying, or hereafter to be brought in, he giving a receipt for the same.

On the 25th of November, 1801, an order was passed in favour of Grafton D. Hanson, another infant legatee, similar to the foregoing. After which the case was again brought before the court at the instance of a purchaser.

26th May, 1803.—HANSON, Chancellor.—Whereas, the decree for a sale in this cause passed, directs, that on payment of the whole purchase money, the trustee, Henry H. Chapinan, shall convey to the purchaser in fee; and whereas, it is stated, that several of the purchasers have assigned; and that it would be convenient for the trustee to convey to the assignees. It is *Ordered*, that the said trustee, on the receipt of the whole purchase money, and on being satisfied, that the purchaser hath assigned his purchase; may, on application of the assignee, at his, the said trustee's discretion, convey to the said assignee in fee; and provided an assignment of the purchase hath actually been made fairly, and without fraud and imposition, the conveyance shall operate in the same manner as if it had been made by the direction of the original decree in this cause. The Chancellor has been applied to for a decree directing a conveyance by the said trustee on the part of a particular assignee; but the Chancellor conceives, that he cannot, with propriety, make an *ex parte* decree binding on a person who is no party in any suit here depending. But in case of a conveyance, under the foregoing order, to a fair assignee, there is no doubt, that the assignee's title will be as good as if a conveyance had been made by the trustee to the purchaser, and a conveyance afterwards made by the purchaser to the assignee.—M. S.

(a) 1715, ch. 39, s. 9 and 10; 1729, ch. 24, s. 12 and 13.—(b) 1785, ch. 80, s. 9.

tageous to the ward, might allow the guardian to exceed the income of the estate; to cut down and sell wood, to make use of the principal; and to sell a part of it; *provided*, that no part of the real estate should, on account of such maintenance, or education, be diminished without the approbation of the Court of Chancery as well as of the Orphans Court. (c)

By a special estate act, passed before the act to direct descents, after reciting, that three hundred and fifty acres of land had descended to the five daughters of *John Worthington*, deceased, as his heirs in co-parcenary; and that their mother, also then dead, had, by her will, directed her real estate to be sold, and the money arising from the sale to be put out at interest for their benefit; that one of the co-parceners was married to *John Cradock*, who claimed a partition; but, that a partition of so small a parcel of land would lessen the value, and be detrimental to the interests of the co-parceners, it was directed, that the land which had so descended should be sold, that part of the money, arising from the sale, should be paid to such of the parceners as were married, or of lawful age, to receive the same; and, that the residue should be put out on interest for the benefit of the other co-parceners,

(c) 1798, ch. 101, sub ch. 12, s. 7 and 10; *Brodess v. Thompson*, 2 H. & G. 120.

GOLTIER'S CASE.—This petition was filed on the 18th of December, 1810, by John Goltier, in the Orphans Court of Cecil county; and was soon afterwards, with the proceedings thereon in that court, removed to and filed here. The petition stated, that the petitioner had two children, by his late wife, who were infants; that in right of their mother, they had become entitled, by descent, to an undivided interest in a grist-mill, and about one hundred and forty acres of land; that after consulting with the petitioner, the other heirs, deeming it highly advantageous to all concerned, had contracted to sell the property to Alexander Scott for \$6,424 25. Whereupon the petitioner prayed, that he might be enabled to convey the estate to the purchaser on behalf of his children, inasmuch as he verily believed, that such a sale would much promote the interest and welfare of his said children, and enable him to educate and support them more to their advantage than if no such sale were made.

12th December, 1810.—*By the Orphans Court.*—On due consideration of the allegations contained in the within petition, the court is of opinion, that the sale prayed for is to the advantage of the aforesaid Francis and Elizabeth, and should be confirmed; and that the petitioner John Goltier be authorized to make a conveyance of that part of his wards' real estate which they have by descent from their cousin Jonathan Booth, and mentioned in the within petition. In testimony whereof, I have hereunto set my hand and seal of office, this twelfth day of December, in the year of our Lord eighteen hundred and ten. David Smith, register.

18th December, 1810.—*KILTY, Chancellor.*—Under the power vested in this court by the act of 1798, ch. 101, sub ch. 12, s. 10, the above order of the Orphans Court is approved.—*Chancery Proceedings*, 1810, fol. 563.

until they should attain such age or marry. (d) By another special act, passed at the same session, after reciting, that *Caleb Davis* had died intestate, leaving but very little personal estate; seised of one tract of land containing two hundred acres; and of another parcel containing ninety-nine acres; which were not, and could not be rented for more than sufficient to discharge the annual assessment; and leaving four infant daughters, who were greatly distressed, and who could not be educated, or maintained, unless by a sale of their inheritance; it was directed, that the land should be sold; that the interest of the purchase money should be applied to their education and maintenance; and that the principal should be divided and paid to them as they respectively arrived at the age of sixteen. (e) By another special act, it was stated, that *Joseph Walker* died intestate, seised of an improved lot of ground in Pig point, which would have then sold for one thousand pounds; but, from a decay of the improvements, since that time, had been so reduced in value, that its rents were wholly unequal to the necessary repairs; that the son and heir at law of the deceased, being then but four years old, before he arrived at full age the lot would be of no value. Whereupon it was directed, that the lot should be sold, and that the money arising from the sale should be put out at interest for the benefit of the heir. (f)

In another special act it was set forth, that several lots of ground in Baltimore town, which had descended to, and been made over to three infants, were then useless to them, and very heavily burthened with taxes; but would be of great advantage to the said children if leased out on ground rents for ninety-nine years renewable forever. Whereupon it was directed, that the lots should be leased with the approbation of the Orphans Court. (g) It was stated in a special act passed on the petition of *Sarah Parran*, that her husband *Richard Parran* died seised of two tracts of land, one in Calvert, and another in Charles county, and personal estate to a considerable amount; that at the time of his death he was much indebted, and left the petitioner his widow, and three daughters; and that it would be for the benefit of the children to sell the land in Charles county, to save a part of the personal estate; where-

(d) November, 1781, ch. 4.—(e) November, 1781, ch. 15; 1804, ch. 10.—
 (f) 1784, ch. 28.—(g) 1784, ch. 31; 1794, ch. 5; *Evroy v. Nicholas*, 2 Eq. Ca. Abr. 488; P—*v. Bell*, 6 Ves. 419; In the matter of *Starkie*, 3 Cond. Chan. Rep. 79.

upon it was enacted, that the land in Charles county, containing two hundred and fourteen acres, should be sold, and the proceeds applied towards the payment of the debts due from *Richard Parran*, deceased; but that no part thereof should be paid to *Sarah Parran*, nor should she be entitled to any more of the personalty than if this act had not been passed. (*h*)

Since the alteration of the common law by the act to direct descents, on its being represented to the General Assembly, by the petition of *William Wirt*, a minor, that he was entitled to the moiety of a house and lot in Bladensburg, that he had received a classical education, and was then engaged in the study of the law; but, that his personal estate, with the annual value of his real estate, were insufficient to enable him to prosecute his studies with advantage; it was enacted, that his interest in the house and lot should be sold, and the proceeds applied towards his education and use. (*i*) At the next session of the General Assembly, by the petition of *Judith Wallace*, on behalf of herself and her children, it was represented, that her husband *John Wallace* died intestate in the year 1789, leaving the said widow and five children, and seised of a tract of land containing eighty or ninety acres which was rich, but entirely destitute of timber and firewood; the expense of procuring which exhausted the annual profits of the land. Whereupon it was enacted, that the land so descended should be sold; and, with the proceeds, other land should be purchased in which the widow should have her right of dower, and which should be held, and pass as the land which had been sold. (*j*) In addition to these many other similar estate acts have been passed, in almost every one of which it appears, that the General Assembly were, in some way, satisfied of the truth of the facts as stated; and that it would be exceedingly difficult, if not altogether impracticable, to provide for the *maintenance* and *education* of the infants in any other manner than by the proposed sale of their real estate. (*k*)

In all, or almost all of these cases, it is evident, that the Legislature interposed merely for the purpose of removing a temporary

(*h*) 1784, ch. 51; 1801, ch. 82; 1802, ch. 67; 1803, ch. 91; 1810, ch. 58 and 71; 1811, ch. 88; *Waring v. Waring*, 2 Bland, 673.—(*i*) 1791, ch. 43.—(*j*) 1792, ch. 28.—(*k*) 1805, ch. 28 and 33; 1809, ch. 21 and 72; 1810, ch. 57, 74 and 153; 1811, ch. 95, 149 and 209; 1812, ch. 83, 91, 175 and 186; 1813, ch. 19, 29, 54, 80, 93, 151 and 152; 1814, ch. 31, 44, 74 and 90; 1815, ch. 31, 117, 124, 130, 134 and 136; 1825, ch. 88; *Campbell's case*, 2 Bland, 209.

disability in order to give relief under a then pressing necessity; and to confer a capacity on infants to do acts necessary to enable them to obtain maintenance and education, or to discharge a duty to creditors who had claims upon their property. No material injustice could arise from any legislative interposition to such an extent; because the infant's property was not to be applied to any purpose for which it was not generally or specially bound. To authorize a sale of an infant's imperishable estate for any other purpose, would be not merely to endow him with a capacity to act for his own support, or in discharge of an obvious duty; but, in effect, to divest him of his property, or to force him to make an alienation of it, according to the fanciful opinions and notions of others; in all cases with much risk to the whole, and the certain loss of a part in commissions to the agents employed to make the sale; and in many cases without the least just occasion for such alienation. (*l*)

This application, for the sale of the real estate of these infants, is founded upon the provisions of several public and general acts of Assembly, by which, among other things, it is declared, that where any infants shall be possessed of any real estate, it shall be lawful for the Chancellor, upon the petition of the guardian or *prochein ami* of such infants, after summoning them, and their appearance by guardian, to be appointed by the Chancellor, to issue a commission to not less than three discreet and sensible men, freeholders of the county where such lands may lie, to view and ascertain, by competent and disinterested evidence, the value of such lands, taking into consideration the quality, local situation, improvements, with all the advantages, and also the disadvantages and incumbrances attending the same; and to determine whether it would be to the interest and advantage of the infants, that such land should be sold; (*m*) and report the same to the court with their reasons therefor. *Provided*, that such report shall not be conclusive, but the court may, in its discretion, examine witnesses, and have other testimony, and shall decree a sale only in those cases where, under all circumstances, the court shall be satisfied, that a sale would be for the interest and advantage of the infants. And it is further declared, that in case of the death of the infant,

(*l*) *Seys v. Price*, 9 Mod. 220; *Hearle v. Greenbank*, 3 Atk. 695; *Ware v. Polhill*, 11 Ves. 278; *Ex parte Philips*, 19 Ves. 122.—(*m*) The Legislature has since authorized the real estate, chattel real, or trust interest of an infant to be sold, leased or mortgaged, 1831, ch. 311, s. 2, 3 and 12; 1835, ch. 350, s. 9.

without issue, the proceeds of sale shall be considered as real estate, and shall descend to those heirs who would be entitled to the land if it had not been sold. (n)

There is every reason to believe, that these public and general acts of Assembly, which it is proposed by this petition to have put in execution, were passed in consequence of the numerous applications which had been previously made to the Legislature for authority, by special estate acts, so to dispose of the property of infants, as most judiciously and effectually to maintain and educate them; and in order to turn over to the courts of justice a class of cases which, evidently, belong more properly to the judicial than to the legislative department of the government. But these laws, like some others of no less utility and importance, lay open to the most latitudinous construction, and pernicious application; and therefore require to be carefully considered, and in each case very guardedly carried into effect. (o)

By virtue of the power of *eminent domain*, which belongs to ours as to all other governments, private property may be taken for public use, on a just compensation being made. But it may be safely assumed, that the Legislature can, by no act, take the property of an adult citizen from him and give it to another, for any purpose, with or without compensation; and that no adult citizen can be compelled to use, apply, or alienate his property in any way whatever merely with a view to his own benefit and advantage. The holding and the application of private property, at the pleasure of its owner, so it be not as a nuisance or made injurious to others, according to the fundamental principles of our government, are rights so absolute, that no power in the land can touch or control them in any degree whatever. Infants, it is clear, hold their property by the same kind of absolute and uncontrollable rights as adults. It is the duty of the state to protect all her citizens; but more especially her infants, for whom she is bound to provide maintenance and education, in case they should be without parents or pecuniary means. The state has a deep interest in the proper maintenance and education of her infants; and, consequently, it must be within the constitutional competency of her government to make any legal provision necessary to facilitate the application of the property of infants to such purposes, as well for her own

(n) 1816, ch. 154; 1818, ch. 133, s. 2, and ch. 193, s. 7, 12 and 13; 1819, ch. 183; *Tilly v. Tilly*, 2 Bland, 436.—(o) *Waring v. Waring*, 2 Bland, 673.

benefit as to prevent such infants from becoming idle paupers and a burthen to the community ; and therefore no law which provides for the preservation of their property, and the proper application of their estates to their maintenance and education, can be deemed an infringement of their rights.

An infant may, apparently, succeed to property which cannot, in strictness, be said to belong to him, because of the claims of others. The creditors of the ancestor from whom the estate descended, must be first paid before any part of it can be applied to the use of the infant heir. An act of Assembly which facilitates the application of such an estate to the payment of the debts of its late owner, merely gives to it its proper direction ; and therefore, instead of violating, affirms the right to it, as deduced from its deceased owner. Nor can any law which goes no further than to provide for the application of an infant's estate to his maintenance and education, be regarded as, in any respect, a violation of such infant's right of property. An infant is, in general, incompetent to contract ; but he may, by contract, bind himself for his maintenance and education ; and hence a legislative enactment, which facilitates such an application of his estate, co-operates with the infant's legally qualified right to contract, in discharge of a duty to himself, without trenching upon any of his rights.

The several tribunals of the judicial department of our government, have been framed and established with a view to the determination of matters in controversy between individuals. The Orphans Courts have been entrusted with authority to appoint guardians for infants ; and to see that such guardians perform their duty as prescribed by law ; and the Court of Chancery has been invested with a similar and more extensive power in regard to the care of infants and their estates. (p) But neither of those courts, nor any other of the tribunals of the republic have been, or can constitutionally be clothed with a discretionary power to sell and dispose of the property of any one, infant or adult, merely for his own interest and advantage, apart from the maintenance and education of such infant owner. Such a power is not judicial in its nature ; and therefore, cannot be conferred upon or exercised by any branch of the judicial department.

To coerce the payment of debts, and to make sale of property for that purpose ; or to provide for, and enforce the application of

(p) Corrie's case, 2 Bland, 489

an infant's property to his maintenance and education, may well be regarded as the natural course and necessary result of a judicial power; as the proper exercise of judicial functions. But to institute an inquiry as to the propriety of disposing of any property, and the selling of it, and investing the proceeds of the sale in other property merely for the general interest and advantage of its infant owner, without reference to any peculiar circumstances, as in the before mentioned cases of a conversion of one kind of property into another, has nothing of the aspect or character of an exercise of judicial authority about it. Such a proceeding puts in issue, and determines no matter in controversy, either as to the claim of a debt, or of maintenance, or of any other right which had been denied, disputed, or neglected. It has nothing judicial even in its appearance. The proceeding is merely that of a trader, who, upon inquiry, conceives it to be to his interest and advantage to carry his property into the market, and to sell it for the purpose of making a more profitable investment of its proceeds. But the several judicial tribunals of the republic are unfitted and incompetent to act as traders; they have not been organized for any such purpose, and cannot constitutionally be clothed with any such power. An arbitrary and discretionary power, in a court of justice, to sell and dispose of the property of a citizen, in any case in which the court should be induced to believe that it would be for his own interest and advantage, could not fail, in many instances, to be productive of the greatest mischief. But the exercise of such an authority over the property of an infant, would be pernicious in the extreme; not having the means, or the power to object, or to complain pending the proceeding, the helpless infant might be plundered without mercy; and that very court of justice which was intended as his shield, might be made the instrument of the iniquity.

Upon these considerations, therefore, I am of opinion, that these public acts, now proposed to be executed, so far as they clothe this court with a new and more enlarged jurisdiction, must be so construed as to confine them to those cases only where it is proper and necessary to sell the infant's estate for his maintenance and education; that the general terms, 'for the interest and advantage of such infant,' used in the first section, must be limited to mean, 'for the maintenance and education of the said infant,' as spoken of in the latter sections of them; (q) and consequently, in order

to authorize a sale of an infant's estate, under these laws, it must be stated and shewn, that he has no other property; that he has no other means of obtaining a maintenance and education from his property, from a parent or otherwise; and that, under all circumstances, a sale of that, his only property, is indispensably necessary to place it in safety, and to secure to him, from it, a maintenance and education; and it is moreover my opinion, that all other and more latitudinous interpretations and applications of these laws, must be deemed unconstitutional and void.

These general and standing acts of Assembly extending to the utmost verge, and in some respects beyond the constitutional competency of the General Assembly, have clothed this court, unassociated with any other tribunal, with a large, entirely new, and exceedingly delicate discretionary power, as to the disposition of the real estates of infants. It is a power which can, in no case, be carried into effect, with the same degree of confidence as those which the court exercises in controversies between litigating adults; for, in whatever manner a suit of this kind may be instituted, it is obvious, that the whole proceeding must be substantially, and in fact, conducted without the actual appearance, or any expression of opinion from the only person whose interest and advantage is alone to be considered. It is a sort of judicial proceeding which may easily be got up, and brought before the court by persons actuated by motives entirely at variance with the interests of the infant; and which sinister motives cannot be so seasonably detected as to prevent the designed sacrifice of the infant's interests. For, according to the general practice, in all cases where an infant is made a defendant, the plaintiff, or petitioner, names the commissioner, and has the carriage of the commission for taking the infant's answer by guardian; and, in cases of this kind, the Chancellor having no means of obtaining information, but through the petitioner, is under a sort of necessity of accepting his nomination of three freeholders, to whom the commission of view and valuation is to be directed. There evidently, therefore, can be no security that a correct description of all the several component parts of the infant's real and personal estate has been given in the petition, or shewn in any way, (r) or that all the

(r) It is stated in this petition, that these infants had 'no other source of revenue than this farm;' whence it might be inferred, that they had no other estate whatever. Yet by the act of 1832, ch. 192; and their petition, filed here on the 25th of May,

material facts and circumstances of the case have been brought before the court, as a foundation for that decree for a sale, which it is called upon to pass. And after the sale has been made, and the estate converted into money, the money may lay for some time unproductive, as the court may have no means of making an immediate investment; and which when made, cannot be altogether so free from risk, or any thing like so absolutely secure as the real estate itself, the title to which was undisputed; and especially where it consisted of lands in the country, with a small proportion in value of perishable edifices. (*s*)

These laws authorize an application of this kind, as well for the benefit of a single infant, holding a real estate in severalty, as in behalf of a plurality of infants, possessed of a real estate as joint-tenants or tenants in common with each other. They authorize such an application in behalf of an infant or infants possessed of a legal real estate of inheritance, or of an equitable title to real estate, or who may be seised of a *reversion*, (*t*) dependant upon an estate for life; and they apparently embrace real estates of the greatest value and largest annual profits, as well as the smallest and least productive. In order to obtain a decree for a sale it is declared, that the court must be satisfied, that it would, under all circumstances, be for the interest and advantage of the infant. Thus calling for the exercise of a large and indefinite discretion, apparently regarding the interests of none but the infants; yet it is declared, that, in case of the death of the infant without issue, the proceeds of sale shall descend as lands. Hence it is evident, that although the realty is to be converted for the benefit of the infants; the sale is not allowed to operate as a total and immediate conversion; but, during the minority of the infants, the estate is, for certain purposes, to retain its original character, and remain in a transitive condition. But the placing of it in such a situation may be productive of much inconvenience, as regards the interests of the infants themselves, and may create much embarrassment as to all others who may have any concern with it. (*u*)

1833, it appears, that they had inherited, and then held other real estate of considerable value. See also the bill of Henry L. Williams and others v. Susan F. Williams and others, filed here on the 1st of July, 1826, and the decree thereon, 18th July, 1826; *Hoby v. Hobby*, 1 Vern. 218; In the matter of *Stiles*, 1 Hopk. 341.—(*s*) *Doughty v. Bull*, 2 P. Will. 322; *Oates v. Brydon*, 3 Burr, 1898.—(*t*) Since extended to a *remainder*, by 1831, ch. 311, s. 9; and to trusts for infants, and to chattels real, by 1835, ch. 380, s. 9.—(*u*) *Leigh & Dal. on Conversion*, 87, 147.

An application for the sale of the real estate of a single infant can only be sustained because of the wasting, depreciating, or unproductive nature of it, and the *necessity* of obtaining for him an adequate maintenance from that, his only property; and the reasonable certainty, or very strong probability, that by a sale, the proceeds may be invested in some manner nearly or altogether as safe, and much more productive than the land itself, by its annual rents, or by its reasonably probable appreciation of value in the lapse of some ten or twenty years during the minority of its owner. But where the application is made on behalf of a plurality of infants, who hold as joint-tenants or tenants in common, although these reasons for a sale may not be shewn to exist with the same force, or to the same extent; yet as, in general, it is much more beneficial to every one to hold in severalty, than as co-tenants with others, it must, in most cases, be to the interest and advantage of such infants to have a partition made of their estate; (*w*) and therefore, if it should be shewn, that the real estate is of such a nature, that a partition cannot be made of it, without loss, or disadvantage to the parties; and, that a sale then, or at some future period, must be made, in order to effect a division of its value among its owners, that circumstance of the indivisible nature of the estate may be taken into the estimate as an additional reason why a sale should then be made as called for. (*x*)

Here the application for a sale has been made by the widowed mother of the infants in their behalf; and all the circumstances shew, that a sale would be for their interest and advantage. The infants have no other source of revenue than this farm, which consists of two distinct tracts of land, the one held as chiefly or altogether valuable, because of its furnishing wood for the other; and the principal tract incapable of partition into four parts without much loss or disadvantage because of its valuable improvements of mills; and a large amount in value of other perishable edifices; and which principal tract, from its location along the margin of two water-courses, and being intersected by much frequented public roads is exposed to great injury from freshets and depredations along its borders. These and the other circumstances mentioned

(*w*) *Abell v. Heathcote*, 4 Bro. C. C. 284; *Oates v. Brydon*, 3 Burr, 1898.—

(*x*) But if all the heirs be minors, the estate cannot be sold by any preceding ground merely on the provisions of the act to direct descents, until the eldest arrives at age, 1820, ch. 191, s. 9.

by the commissioners, taken together, form a sufficient ground for a decree for a sale as called for on behalf of its infant owners.

The law declares, that, in cases like this, if there be a widow and she assents to a sale of the whole estate, she shall signify her consent in writing, and the same shall be filed with the register; and thereupon the trustee shall proceed to sell the whole estate disencumbered of her right of dower. (y) And as to other cases it is declared, that before any sale of land shall be decreed, to affect the interest of a widow, her consent in writing shall be filed. (z) But, in this instance, no separate express consent in writing of this widow can be deemed necessary to be filed before the decree or sale; because she herself is the petitioner who presents herself here as the widow of the deceased owner of the estate; and also as the guardian of his four infant children to whom it had descended, and for whose interest and advantage she prays to have the whole of it sold; and, therefore, her consent is thus as clearly given by her written petition, as if it had been distinctly expressed by a separate instrument of writing.

Decreed, that the lands and premises in the proceedings mentioned be sold, that *Richard Potts* be appointed trustee to make the sale, &c. having first given three weeks public notice inserted in such newspaper or papers as he shall deem proper, of the time, place, manner, and terms of sale; which shall be as follows: one-third of the purchase money to be paid in one, and one other third in two years, and the residue in three years from the day of sale, with legal interest on the whole from the day of sale; the purchase money to be secured by bond with surety to be approved by the trustee, &c.

After which the trustee, by his petition, asked leave to suggest to the Chancellor an alteration of the terms of sale prescribed by the decree, with a hope and under a belief, that the interests of the parties would be promoted by requiring a part of the purchase money to be paid in hand, and an extension of the time of payment of the balance; because much of the value of the estate depended upon the improvements upon it, consisting mainly of a costly mansion, and a large and very extensive mill; the loss of either of which, by fire, would impair the whole value of the estate to such a degree as to reduce the security contemplated by the reservation of the title until the whole purchase money was paid;

and further, because the habit of purchasers in said county is consistent with the payment of a third, or a fourth of the amount, and the extension of the credit for the residue would operate as an incentive to a more liberal competition among bidders who may be equal in general ability, but greatly differ in their facilities to command large sums at pleasure. He therefore submitted, that the decree should be so modified as to require one-fourth to be paid in hand, and the balance in five or six annual payments, to bear interest from the day of sale, and be secured by bond with surety.

7th June, 1828.—BLAND, Chancellor.—This case having been again presented for further consideration, as to the terms of the sale, the proceedings were read and considered. The petitioner avers, that the amount for which the estate would sell, by a judicious investment of it, would yield and secure to the infants an income nearly three times greater than the net rents of the property, exclusive of the outlay for repairs and re-buildings. To maintain the infants, and to improve their income, by converting their estate into money, and investing it with as little delay and hazard as may be, are the chief objects of this proceeding. It is more necessary, in cases of this kind, where the court is, in effect, moving *ex parte*, for the benefit of infants, than in controversies to which adults are parties, that the estate should be advertised for sale at auction; and thus completely put into the market to prevent any unfairness, and to insure a sale at its full value, either at the appointed time of public sale, or at any subsequent period in another way, if a public sale cannot be made of it.

It is true as suggested by the trustee, that lands sell to greater advantage on long than on short credit; and it is better, in cases like this, to sell on an extended credit, with a stipulation, that interest shall be paid annually, than for cash; because the equitable lien is the best security the infants can have for the payment of the principal and interest of the purchase money. A sale on long credit, in cases of this kind, is always regarded by the court as being, in effect, an investment of the balance of the purchase money for the benefit of the infants. And, therefore, the purchaser will not be permitted to pay it before the stipulated day of payment, without paying the interest thereon, which would have accrued up to that time, so as to prevent any loss by the delay in making another investment. But on the other hand, if there is every reason to believe, that a good and safe investment may be immediately made; or if it appears, that there are any outstanding

incumbrances upon the estate, that it may be sold on a shorter credit, or for such a proportion of cash as may be necessary to clear off any then existing incumbrances, as dower, mortgages and the like.

The court can have no objection to an alteration of the terms of sale as proposed by the trustee; but in order to prevent a sale of the estate, at public auction, for less than its value; the trustee must fix a price, or have a reserved bid for the benefit of the infants. Under ordinary circumstances, where property is offered for sale at auction to the highest bidder, it is held at law, though doubted in equity, to be a violation of the terms of such an agreement, and a fraud upon the sale and the public to take advantage of the eagerness of bidders by screwing up the price by means of a puffer or bye-bidder; (a) nor can a purchaser, on the other hand, be allowed to depreciate the value of an estate intended to be sold. (b) But, to prevent a sale of the property for less than its value, where the sale is not made for the payment of debts; but merely to effect a division; and particularly, in cases like this, where the object is a conversion of the property as necessary for the interest and advantage of infants, or of persons *non compos mentis*, it has been the practice here, as in England, to allow a reserved bid for the benefit of the owners, and to authorize the trustee to employ a bye-bidder accordingly. (c)

(a) *Bexwell v. Christie*, Cowp. 395; *Howard v. Castle*, 6 T. R. 642; *Crowder v. Austin*, 13 Com. Law Rep. 11; *Moncrieff v. Goldsborough*, 4 H. & McIl. 282; *Bramley v. Alt*, 3 Ves. 620; *Conolly v. Parsons*, 3 Ves. 625, note; *Townshend v. Stangroom*, 6 Ves. 338; *Smith v. Clarke*, 12 Ves. 477.—(b) *Sug. Ven. Pur.* 16; *Doolin v. Ward*, 6 John. Rep. 194.—(c) *Conolly v. Parsons*, 3 Ves. 625, note; *Smith v. Clarke*, 12 Ves. 477; *Jervoise v. Clarke*, 1 Jac. & Wal. 389; *Brooker v. Collier*, 3 Cond. Cha. Rep. 439; *Shelf. on Lunatics*, 366, 368.

KILTY v. QUYNN.—This bill was filed on the 4th of June, 1804, by John Kilty against John Quynn, and Kitty, Betsey, William, Allen, and Casper Quynn, the five infant children of Allen Quynn, Junior, deceased, and John Gassaway, a minor, and Eliza Gassaway, children of Polly Gassaway, deceased. The bill stated that Allen Quynn the elder being seised in fee simple of certain tracts, lots, and parcels of land, made his last will according to law and died, by which will he devised, with some particular dispositions, the whole of his estate, the one-fourth part to his son, the defendant John Quynn; one other fourth part to his son-in-law this plaintiff; one other fourth part to the infant defendants the children of his late son Allen Quynn, Junior; and the other fourth part to his grandchildren the defendants John Gassaway and Eliza Gassaway, son and daughter of his late daughter Polly Gassaway; and appointed this plaintiff and John Gassaway his executors. That some of these devisees being minors, a division could not be effected without the interposition of this court, and without a sale of the property thus devised to them. Whereupon it was prayed, that a sale might be ordered; a division made; and that the plaintiff might have such relief as was suited to the nature of his case, &c.

Therefore it is *Ordered*, that the property in the proceedings mentioned be sold upon the following terms, that is to say, one—

The infant defendants answered by their guardian *ad litem*, and the adult defendants also put in their answers. They all admitted the facts set forth in the bill, and consented to a sale and division being made as prayed.

18th February, 1805.—HANSON, *Chancellor*.—*Decreed*, that the lands and premises in the bill mentioned, together with any other land that Allen Quynn may have, by his last will, devised to the complainant and the defendants, be sold, and the money arising therefrom, under the direction of the Chancellor, after paying the costs of this suit, be divided amongst and paid to the respective parties according to their several interests; that John Johnson, who is recommended by more than one-half in value of the persons interested, be appointed trustee to make the sale; that the course and manner of his proceeding be as follows, &c. &c., the sales to be on credit, bond with approved surety to be given to the trustee as such, for the payment of the purchase money as follows, one-fourth thereof, with interest on the same, on or before the expiration of one year from the day of sale; one other fourth thereof, with interest on the same, on or before the expiration of two years from the day of sale; one other fourth thereof, with interest on the same, on or before the expiration of three years from the day of sale; and the remaining fourth, with interest thereon, on or before the expiration of four years from the day of sale, &c. &c., and upon the approbation, ratification, and confirmation by the Chancellor, which will be, if at all, just six weeks from the day of sale; and upon receipt of the whole purchase money, and not before, the trustee by a good deed, &c. &c. The Chancellor considers the trustee as having the right or power of postponing a sale, if in the trustee's opinion necessary; and likewise of having a bye-bidder.

The trustee Johnson reported, that he had given bond as required; and that he had on the 15th of March, 1805, made sale of a part of the real estate of the testator. At the foot of which report there was a note in these words: 'We the subscribers do approve of the sale made by the trustee to Mrs. Isaac Duckett, as contained in the foregoing report, and request the Chancellor to confirm the same.' Signed John Gassaway, guardian to Eliza and John. John Kilty.

3d July, 1805.—HANSON, *Chancellor*.—*Ordered*, that the sale made by John Johnson of the real estate of the testator Allen Quynn, be absolutely ratified and confirmed; that for his whole trouble and expense incurred, or to be incurred, in the execution of his trust, he be allowed the sum of £150; and that the auditor state the application of the money arising from the sale, after deducting the said commission and costs.

The auditor reported a distribution of the proceeds of the sales, in which he awarded one-fourth of them to the plaintiff in his own right, and another fourth to him as the assignee of the defendant John Quynn.

Upon which the trustee Johnson, by his petition, stated, that he was desirous of closing his trust; and as the bonds, taken to secure the payment of the purchase money, would not become due for some time, he prayed, that he might be ordered to assign them to the several devisees in satisfaction of their respective shares.

10th July, 1805.—HANSON, *Chancellor*.—*Ordered*, that the trustee after receiving on each bond an equal proportion of the costs and expenses, as stated in the auditor's report, assign to the respective parties entitled, the bonds as follows, to wit, to John Kilty the two bonds, one due on the 15th day of March, 1807, the other due on the 15th day of March, 1808; to the guardian of the children of Allen Quynn, the son,

fourth part of the purchase money to be paid on the day of sale, or on the day of the ratification thereof; and the residue in five equal annual payments to be accounted from the day of sale; the whole purchase money to bear interest from the day of sale, and to be secured by bonds with surety to be approved by the trustee. And the property may be sold entire, or in such parcels as the trustee may deem most advantageous to the parties. If the trustee should not be able to dispose of the same at auction, after having given public notice, as directed by the decree, then he may make sale thereof either at public or private sale, as he may deem most for the interest of all concerned. And it is further *Ordered*, that so much of the decree of the 24th of May last, as is in any manner incompatible with this order, is hereby rescinded.

After which the trustee reported, that in pursuance of the decree he first advertised the estate called *Ceresville*, in newspapers in Washington, Baltimore, and Fredericktown, for more than three weeks before the 24th of July, 1828; and, on that day, on the premises offered it to the highest bidder, reserving publicly one bid to prevent a sacrifice; and there being no bid beyond forty dollars per acre, which would have been a great sacrifice, the trustee was unable to sell; and now holds the same for disposal in parcels, as may suit purchasers, at private sale.

The trustee also reported the circumstances of the estate for di-

deceased, one bond due on the 15th day of March, 1809, and one bond due March 15th, 1806, equally to Eliza Gassaway the daughter of John Gassaway, and to the guardian of John Gassaway, Junior; Eliza to take in her own right, and the guardian of John Gassaway, Junior, to take for him. But the Chancellor wishes, and proposes, that the last bond be given up, and instead thereof, there be two bonds given, one for one-half of the sum to Eliza Gassaway, and another for the other half unto the guardian of John Gassaway, Junior.

It is declared that in case any sale shall be made on credit by direction of the Chancellor under the authority of the act of 1785, ch. 72, s. 9, he may direct any bond taken in consequence of such sale to be assigned to such mortgagee or creditor. It would seem therefore, that the assignment of the bonds here directed could not, in strictness, have been made under the authority of this act of Assembly; but as it has been held, in bankruptcy, that where a distribution is directed to be made, it may be made in kind, as well as in money, so here, an assignment of the bonds, as in this instance, may be entirely within the power of the court, and be regarded as, in many respects, the most beneficial distribution which the devisees or claimants could have. *Hitchcock v. Sedgwick*, 2 Vern. 158; *Spurrier v. Spurrier*, 1 Bland, 475; *Coombs v. Jordan*, post; *Ex parte Boone*, 2 Bland, 321; *McMullin v. Burris*, 2 Bland, 357.

rections as to renewal of existing leases until it should be sold. That the mill, mill-house, and appurtenances were then under lease at *six hundred dollars per annum*, subject to the cost of necessary repairs, to expire on the first day of August then next, and which the then tenant was desirous to continue for another year. That the ferry and ferryman's house, and blacksmith's shop were under lease to the then tenant for one year from the fourth of May then last, at *one hundred and thirty dollars*; that the farm, being the residue and bulk of the estate, and embracing all the arable land, was under lease to *Daniel Hughes*, for one year, from the first of April then last, at a rent of *eight hundred dollars*, subject to necessary repairs. In addition, the trustee suggested the necessity of some authority to make such repairs of enclosures as had been injured or swept away by inundations of the Monocacy river; and the necessity of renewing the lease of the farm some months before the termination of the lease; and for further directions and orders in the premises.

29th July, 1828.—BLAND, *Chancellor*.—There seems to be no doubt, where the property in litigation, or its profits are in danger of being materially injured or lost, that this court has the power to interpose for the purpose of preventing its waste or destruction. It is upon this ground, that it grants an injunction to stay waste pending the prosecution of an action of ejectment, or any other suit to try the right. (*d*) And in other cases grants an injunction or appoints a receiver to save the property in controversy from injury or loss. (*e*) Upon the same principles, where a real estate had been decreed to be sold, and the trustee appointed to make the sale, reported on oath, before he had made sale of it, that the occupying tenant, or others, were committing, or were about to commit waste, an injunction was granted to prevent it; (*f*) because a decree for a sale to effect a partition or to pay debts virtually takes possession of the estate and vests it in the court for the purpose of distribution. (*g*) And so where the property taken under a sequestration was of a perishable nature, and was then likely soon to go to decay, it was ordered to be sold, for the benefit of all concerned, to prevent a total loss. (*h*)

(*d*) *Duvall v. Waters*, 1 Bland, 569.—(*e*) *King v. King*, 6 Ves. 172; *Atkinson v. Henshaw*, 2 Ves. & Bea. 85; *Ball v. Oliver*, 2 Ves. & Bea. 96; *Beam's Pl. Eq.* 71.—(*f*) *Clark v. Clark*, 24 January, 1822, *per Johnson, Chancellor*.—(*g*) *Shewen v. Vanderhorst*, 4 Cond. Cha. Rep. 461.—(*h*) *Wilcocks v. Wilcocks*, Amb. 421; *Mitchell v. Draper*, 9 Ves. 208.

In cases where real estates have been sold, and the purchaser, who has been let into possession, refuses to pay the purchase money; because, as he alleges, the title of the vendor is defective; and yet continues to hold the estate, the court, on a bill by the vendor for a specific performance will set an occupation rent for the estate, which the vendee will be compelled to pay pending the litigation, upon the ground, that the party might recover at law for use and occupation. (i) And an occupation rent may be set of the estate as against a mortgagor, on a bill to have the mortgage redeemed, until the suit can be determined. (j) So too where a purchaser, under a decree of this court, after having been let into possession, failed to pay the purchase money; and, yet continued to hold the estate, after he and his sureties had become insolvent, the court set an occupation rent for the estate, which the purchaser, holding the possession, was compelled to pay, pending the proceedings to effect a re-sale for the payment of the balance of the purchase money. (k)

Where, on a decree for a sale of a mortgaged estate to satisfy

(i) *Smith v. Jackson*, 1 Mad. Rep. 618; *Dakin v. Cope*, 3 Cond. Cha. Rep. 66; *Donovan v. Fricker*, 4 Cond. Cha. Rep. 77.—(j) *Wilson v. Metcalfe*, 1 Russ. 530.

(k) *MACKUBIN v. FARRALL*.—This bill, filed on the 25th of June, 1823, stated, that the plaintiff George Mackubin, as trustee, had sold a tract of land to the defendant Walter Farrall for the sum of \$5,656 75; for the payment of which the defendant gave bond with sureties; that the defendant had paid a small part of the purchase money; and that he, and his sureties, were then insolvent. Whereupon it was prayed, that the land might be re-sold for the payment of the balance of the purchase money. The defendant, by his answer, said, that he had paid \$720; and admitted the truth of the other facts set forth in the bill. Upon which it was, on the 8th of December, 1823, *Decreed*, that the land be sold, &c.

After which the trustee by his petition, filed on the 30th of March, 1824, stated, that he had advertised the land for sale as directed by the decree, but could not sell it for want of buyers; and, that there was no prospect of his being able to sell it time enough for the purchaser to make a crop in the then present year; in the meantime the defendant was in possession, and interest was accruing on the claim upon it, and no benefit derived from the land, which was wholly insufficient to pay the amount of the claim. The trustee required to be directed whether he should rent the land for the valuation, that is, \$125, &c.

30th March, 1824.—*JOHNSON, Chancellor*.—The trustee is authorized to rent the land, taking such security for the rent as he may judge sufficient. If an offer to purchase at private sale, during the time for which it is rented, should be made, the trustee will communicate the same, if he judges it advantageous.

Under this authority the trustee permitted the defendant to continue in possession at the specified rent; and afterwards sold the land, which sale was finally ratified. After which the trustee reported, that he had received three years rent; upon which he was allowed seven per cent. for his trouble.

the mortgage debt, on the trustee's reporting, that he had been unable to effect a sale; that the estate was unproductive; and that the buildings and fences on it were going to ruin by reason of the estate's being left unoccupied, and unprotected, he was ordered to rent the estate, from year to year, in the best manner he could; and, from the rents, to have the buildings and fences kept in repair, until a sale could be effected. (*l*) And, where, after a sale, the proceeds have been collected by the trustee, or have been brought into court; and are likely, from the nature of the controversy, to remain for some time unproductive, they may be ordered to be invested in some safe stock, or otherwise so as to be made profitable, pending the litigation, for the benefit of the parties interested. (*m*)

In this case it would obviously be more advantageous to all concerned, that the estate should be so disposed of as to prevent the buildings and fixtures from being injured, or going to ruin; and, that the estate should be made to yield some profit for the maintenance and benefit of these parties.

It is therefore *Ordered*, that the trustee be and he is hereby authorized to lease or rent the property in the proceedings mentioned in such manner, and upon such terms as he may deem most advantageous; *Provided*, that no part thereof be leased for more than one year, and so from year to year until a sale can be effected according to the terms of the said decree; and subject to the further order of this court. And the trustee is hereby authorized and required to cause to be applied so much of the rents and profits as he may deem proper, to the making of necessary repairs in the buildings and fences.

On the 4th of May, 1829, the trustee reported, that he had advertised the property to be sold at auction; but having received no bid for it, but what was obviously below the value, he then advertised it to be sold at private sale; and for that purpose had caused a lot of land to be laid off forty and a half acres and seven perches, including the mill, mill-house, and ferry, and other buildings appurtenant to the same, with the privileges of water and water-rights, &c.; which he had on the first day of May, 1829,

(*l*) *Mackubin v. Hogarth*, 25th October, 1826, *per* BLAND, Chancellor.—(*m*) *Barker v. Harper*, Coop. Rep. 32; *Smith v. Jackson*, 1 Mad. Rep. 618; *Spring v. South Carolina Insu. Comp.* 6 Wheat. 519; *Latimer v. Hanson*, 1 Bland, 51.

sold to *Cornelius Shriver* for the price of twelve thousand dollars payable as follows: three thousand dollars payable on the first of May then next; and the balance in four yearly payments, that is, two thousand dollars a year for the first three years, and three thousand dollars the fourth year, to be secured by bonds with good sureties, bearing interest from the first day of May, 1829; from whom he had also received \$400 for rent, after deducting his account for repairs.

The trustee further reported, that he had, on the same day, sold the residue of the estate called *Ceresville*, containing four hundred and seventy-nine and a half acres and eight perches, to *Charles W. Johnson*, at the price of fifty dollars per acre, on the following terms: six thousand dollars to be paid on the first day of May then next, and the balance to be paid three years from the first day of May next, with interest from that date payable annually thereon, to be secured by bonds with two good sureties, &c. &c. That the amount of the sales, exclusive of the rents not due which were passed to the vendors, was thirty-five thousand nine hundred and seventy-seven dollars and fifty cents. And, that the wood lot yet remained unsold. These sales were finally ratified on the 6th of July, 1829.

The widow and petitioner *Susan F. Williams*, filed an affidavit of a person, not interested in the case, in which it was testified, that she was then, on the 16th day of July, 1829, between forty and fifty years of age, and that she then enjoyed and was in full and good health. Upon which she submitted the case, that a proportion of the proceeds of the sales might be allowed to her in lieu of her dower in the real estate which had been sold.

17th July, 1829.—BLAND, *Chancellor*.—As regards the proportion of the proceeds of sale to be awarded to the widow, as the present value of her dower, which is the matter now submitted for determination, there is a material difference between the rule prescribed by the acts of Assembly and the rule of this court. I had, on considering this matter, thought it would be well to have but one general rule, which should apply indiscriminately to all cases; and, as the court could not in any way depart from the express provisions of the act of Assembly, I suggested the propriety of obtaining from the General Assembly an act, which should establish such a general rule of apportionment as would embrace all cases. A move for that purpose was made in the Senate; (n) and

a bill passed accordingly; which however, failed in the House of Delegates. After which, a case was determined in the Court of Appeals, in which, that tribunal seems to have so highly approved of the rule of this court, (*o*) that I now feel indisposed to alter it; although considered as the mere judicial legislation of the court, it might be presumed to be repealable at its pleasure, until the matter shall have attracted more attention, and become more fully understood. I shall, therefore, pass the subject for the present, without further consideration; and, as I am bound to do, follow the legislative rule, (*p*) in awarding to this widow an allowance out of the proceeds of the sales already made, in lieu of her dower.

Ordered, that the said *Susan F. Williams* be and she is hereby allowed one-seventh part of the net proceeds of the sales of the property in the proceedings mentioned for and in lieu of her dower.

The auditor reported, that he had examined the proceedings, and stated an account in which the proceeds of sales, \$35,977 50, and the rents, \$400 47, received by the trustee were applied, in the first instance, to the payment of the trustee's allowance for commissions and expenses, the costs of suit, \$1,192 89; the widow's allowance, in lieu of dower, \$4,969 23, and her proportion of the rents, \$133 49, and the balance was distributed among the deceased's children, and heirs at law.

31st July, 1829.—BLAND, *Chancellor*.—*Ordered*, that the foregoing report of the auditor be and the same is hereby ratified and confirmed; and the trustee is directed to apply the proceeds accordingly with a due proportion of interest that has been or may be received.

Elizabeth C. Williams, one of these parties, by her petition stated, that since the bill had been filed, and since her answering thereto, she had arrived at her age of sixteen years, and had become entitled to receive her proportion of the proceeds of the sales; and prayed that the amount might be directed to be paid to her, &c.

21st August, 1829.—BLAND, *Chancellor*.—*Ordered*, that the share of so much of the balance of the money, now in court, as the said *Elizabeth C. Williams* is entitled to, be paid to her as prayed by the foregoing petition. (*q*)

(*o*) *Dorsey v. Smith*, 7 H. & J. 346.—(*p*) 1816, ch. 154, s. 10.

(*q*) When this order was passed, the law declared, 'that every female orphan

On the 21st of December, 1830, the trustee further reported, that he had, on the 17th day of December, 1830, sold the woodland at private sale, in two parcels, on the following terms, that is to say, he had sold two lots of said land to *Charles W. Johnson*, containing together one hundred and one acres and three-quarters, more or less, for the sum of twelve hundred dollars; and two other lots containing together one hundred and one half acres, more or less, to *John Derr*, for the sum of one thousand dollars, all to be paid in cash on the ratification of said sales. These sales were finally ratified on the 26th day of February, 1831.

On the 18th of March, 1831, the auditor reported, that he had examined the proceedings and stated an account, in which the proceeds of the last sales, \$2,200, and the rents, \$15, received by the trustee, were applied to the payment of the trustee's allowance for commissions and expenses, county taxes, additional costs, \$126 82; and the widow's allowance in lieu of dower, \$296 17, and her share of the rent, \$5, and had distributed the balance amongst the deceased's children and heirs at law.

From the reports of the trustee, and of the auditor together, it appears, that the whole amount of rent received for one year's rent of the estate, was \$1,530; from which there was a deduction for repairs, presumed to be \$130, leaving a net amount of \$1,400 for rent; and that the net amount of the proceeds of the sales was \$37,256 26; out of which there was awarded to the widow \$5,265 30, in lieu of her dower.

21st March, 1831.—BLAND, Chancellor.—This case is now sub-

should be accounted of full age to receive her estate at the age of *sixteen* years or day of marriage, which should first happen.'—(1715, *ch. 39, s. 15*; *Woodward v. Chapman*, 2 *Bland*, 72.)—And accordingly the Orphans Courts were only authorized to appoint a guardian to a female until the age of *sixteen*.—(1798, *ch. 101, sub ch. 12, s. 1*).—But as the law now stands, she cannot be considered as of full age for such purposes until she attains *eighteen* years of age or marries.—(1829, *ch. 216, s. 5 and 6*; 1831, *ch. 305, s. 5*).—'Women,' says Gibbon, in treating of the Roman law, 'were condemned to the perpetual tutelage of parents, husbands, or guardians; a sex created to please and obey, was never supposed to have attained the age of reason and experience.'—(*Decl. and Fall Rom. Emp. ch. 44*; 1 *Blac. Com.* 463.)—But by this peculiar law of ours, founded upon what principles or policy I do not understand, a female orphan is to have her property handed over to her, and to be left in a condition of legal infancy, formerly from *sixteen*, now from *eighteen* until twenty-one years of age, without a legal guardian or protector of any sort, unless by recourse to the Court of Chancery.—(*Davis v. Jacquin*, 5 *H. & J.* 100; *Bowers v. The State*, 7 *H. & J.* 32; *Fridge v. The State*, 3 *G. & J.* 115; *Corrie's case*, 2 *Bland*, 501; *Waring v. Waring*, 2 *Bland*, 673.)

mitted for the confirmation of the auditor's report, in which he says, he has allowed to the widow one-seventh part of the net proceeds of the last sales in lieu of her dower. The question, as to what proportion of the net proceeds of the sale of the whole estate should be awarded to the widow in lieu of dower, is thus again presented for consideration. The inquiry is one of great importance, and the peculiar circumstances of this case afford the means of much practical illustration. I shall, therefore, avail myself of this occasion to take a larger view of the subject than might otherwise be deemed necessary.

There are many cases falling within the jurisdiction of this court, in which it becomes necessary to put a present value upon an estate for life. As where land is sold, so that those who have a particular life interest in it, are to have an equivalent in value awarded to them out of the proceeds of sale; (*r*) or where the expense of renewing a lease is to be apportioned between the tenant who renews, and he who takes in remainder or reversion; (*s*) or where the value of the estate of an expectant heir, or of one who takes after a life in being, is to be ascertained; (*t*) or where a sum of money is directed to be paid after the death of a person then alive; (*u*) or where the expense of repairs is to be apportioned between a particular tenant and a reversioner or remainderman; (*w*) or where the burthen of an incumbrance is to be taken off in due proportion by several particular tenants and the owner of the inheritance; (*x*) or where a person charged with the payment of an annuity becomes insolvent, or dies leaving an insufficiency of assets to pay all; (*y*) or where there is not a sufficiency of assets to pay all the legacies and annuities given by the testator; (*z*) or where an annuity given as an advancement is brought into hotchpot; (*a*) or where a pension or annuity for life has been given by the government. (*b*) In these and all similar cases, where the *corpus*, or whole body of the estate is to be disposed of

(*r*) Wells v. Roloson, 1 Bland, 457, note.—(*s*) White v. White, 9 Ves. 554.—(*t*) Collet v. Wollaston, 3 Bro. C. C. 228; Gowland v. De Faria, 17 Ves. 21; 1816, ch. 154, s. 13.—(*u*) 1 Price Obser. 33.—(*w*) Strike's case, 1 Bland, 77; 1830, ch. 99.—(*x*) Long v. Short, 1 P. Will. 403.—(*y*) 1 Petersd. Abr. 710, 713; *Ex parte* Thistlewood, 19 Ves. 236; Johnson v. Compton, 6 Cond. Cha. Rep. 20.—(*z*) Long v. Short, 1 P. Will. 403; Devon v. Atkins, 2 P. Will. 381; Hume v. Edwards, 3 Atk. 693; Lewin v. Lewin, 2 Ves. 417; Will. Exrs. 836, 842.—(*a*) Kircudbright v. Kircudbright, 8 Ves. 51.—(*b*) 1 Madison Papers, 280, 320; Act of Congress, 15; 1828, ch. 53; Speeches of Berrien and others, 19 and 29 April, and 15, 22 and 24 May, 1828.

and distributed at once in just proportions, a determination of the present value of all the life interests is necessarily involved. And that constitutional rule which requires every citizen to contribute his proportion of public taxes according to his actual worth in real or personal property, seems to have involved the legislature in a similar necessity of determining the proportional value of life interests. It is thus evident that the principles upon which the court is now called upon to act, have a most important and extensive bearing; and therefore, will merit a careful and comprehensive consideration.

The earliest case in relation to this matter I have met with, is one which was decided by the High Court of Chancery of England in 1661, and from the language used, in the report of it, there is room to infer, that it was the first in which any question as to the proportional value of a particular estate, and a reversion or remainder had ever been presented for determination. It appears, that *Hannah*, the widow of *Sharp*, who had left her a considerable estate, married *Geering*, her second husband, who settled upon her certain land for life as a jointure; that they mortgaged the jointure; after which *Geering* died, and she married *Rowel*, with whom she filed a bill to redeem; and a question arose in what manner a redemption should be made, and by whom; whether by *Hannah*; or by the infant heir of *Geering*; and by whom the mortgage money should be paid. Upon which it was said, that the court conceived it most just, that *Hannah* and the infant heir should proportionably pay what was due upon the mortgage, at the time of the death of *Geering* the mortgagor, rating the estate for life of *Hannah* at one-third, and the reversion in fee at two-thirds, from the time of the death of *Geering*. (c) In the year 1671, the same rule of proportion was applied in a similar case. (d) In 1682, on a bill to redeem, it was declared to be the ordinary rule of the court, that one-third of the redemption money should be paid to the tenant for life, and the residue to the remainderman. (e) In 1692, on a bill by a reversioner against the tenant for life to discover incumbrances, and to compel him to bear his proportion, it was held, that the tenant for life should pay two parts in five of the debts, and the remaining three-fifths by the re-

(c) *Rowel v. Walley*, 1 Cha. Rep. 219.—(d) *Cornish v. Mew*, 1 Ca. Cha. 271.—
(e) *Brent v. Best*, 1 Vern. 70; *Clyat v. Batteson*, 1 Vern. 404; *Thynn v. Duvall*, 2 Vern. 117.

versioner. (*f*) In 1696, it was again, in each of two distinct cases, laid down, that on a bill to redeem, the tenant for life must pay one-third, and the reversioner two-thirds of the mortgage debt. (*g*) In 1710, on a bill by a remainderman to compel the tenant for life of a lease for years to have it renewed, it was held, that the tenant for life should pay one-third of the expense of renewal, and the remainderman the residue. (*h*) In 1718, on a bill brought by creditors, it appeared, that the deceased debtor had, on his marriage, covenanted to settle lands that should be of the value of sixty pounds *per annum*, upon his wife for life, which he had failed to do. Upon which it was held, that the wife should come in only as a specialty creditor; and in order to settle the quantum of her demand, an estimate was directed to be made of the value of her estate for life, at so many years purchase, upon which she was to be let in as a specialty creditor for so much money. (*i*) And in 1750, a similar question having arisen, it was determined, that the tenant for life should pay one-third of the fine and charges of renewing a lease, and that the two-thirds should be paid by the remainderman. (*j*)

No explanation is to be found in any of these cases of the principles of equity upon which the court proceeded in fixing the proportion in which the tenant for life and the reversioner should contribute; nor is the age or health of the tenant for life, spoken of in any of them. It does not, however, seem to have been adopted as an absolute rule, but rather as one of convenience; as a medium by which to apply the rule of equity; for, in a case of this kind, determined in 1697, it is said, that in adjusting what each estate was to pay, each was to be valued at what they were respectively worth to be sold. (*k*) In the first of the before recited cases, it is, in general terms, asserted to be most just; yet it is fair to presume, that *Hannah* at the time of the death of her second husband, when her life estate was estimated as being equal to one-third of the whole, must have been far advanced in life. The proportions fixed by the case decided in 1692, seems to have been considered in 1720, as a departure from the general rule. (*l*) In one of the cases decided in 1696, it was said, that the rule seemed hard, be-

(*f*) *James v. Hales*, 2 Vern. 267; S. C. Prec. Cha. 44.—(*g*) *Ballet v. Spranger*, Prec. Cha. 62; *Flud v. Flud*, 2 Freem. 210.—(*h*) *Lock v. Lock*, 2 Vern. 666.—(*i*) *Freemoult v. Dedire*, 1 P. Will. 429.—(*j*) *Verney v. Verney*, 1 Ves. 428.—(*k*) *Heveningham v. Heveningham*, 2 Vern. 355.—(*l*) *Anonymous*, 1 P. Will. 650

cause an estate for life was then worth nine or ten years purchase, whereas formerly it was worth but seven; (*m*) and in the case determined in 1750, it was said, that the computation of the tenant for life bearing one-third, was wrong as being too low; (*n*) that is, as not laying enough on the tenant for life. (*o*)

In the year 1717, an executor having paid debts to a large amount, and doubts having arisen about the application of the different kinds of assets, there being a deficiency of personalty to pay all the debts, he filed a bill to obtain the direction of the court. Upon which it appeared, that the testator, being seised in fee of some land, and possessed of a lease for years, in other lands, and indebted by specially and simple contract, devised an annuity of forty pounds a year, out of the lease for years to one grandson, and the lease itself to another grandson, and likewise devised all his lands in fee to A. and his heirs. None of the devisees were his heirs at law. It was held, that, to prevent the disappointment of the testator's intent, the devisee of the fee simple estate, and the devisees of the lease, and of the annuity, should each contribute to the debts by specialty. And, for that purpose, it was, among other things, directed, that the master should ascertain what, at the testator's death, was the value of the lands devised in fee, and of the lease, and also of the annuity; and, to lay the said deficiency rateably upon the same according to their respective values; and to state what part necessarily must, and what part most conveniently might be sold for that purpose. (*p*) In 1726, on a bill by a devisee in remainder of an estate *pour autre vie*, it was held to be personal estate which could not be devised away from creditors; nevertheless, being a specific devise, that all the rest of the testator's personal estate, not specifically devised, should be first applied to pay the debts; and, if there were any other specific devise it should come in average with this, and pay its *proportion*; but if that would not serve, that then all should be sold to pay the testator's debt. (*q*) And in 1749, it was held, that a devisee of an annuity for life charged on the personal estate, where there was a deficiency of assets, should abate in *proportion* with the other legatees. (*r*)

(*m*) *Flud v. Flud*, 2 Freem. 210.—(*n*) *Verney v. Verney*, 1 Ves. 428; *White v. White*, 4 Ves. 34.—(*o*) *White v. White*, 9 Ves. 557.—(*p*) *Long v. Short*, 1 P. Will. 403; *Franks v. Cooper*, 4 Ves. 763.—(*q*) *Devon v. Atkins*, 2 P. Will. 380; *Lewin v. Lewin*, 2 Ves. 415; *Rogers v. Millicent*, Dick. 570.—(*r*) *Hume v. Edwards*, 3 Atk. 693.

In the year 1738, in a case of bankruptcy, it appeared, that the petitioner had, in the year 1720, paid three hundred pounds for an annuity of thirty pounds per annum for her life, payable out of the estate of the bankrupt. Upon her petition, to be admitted as a creditor for the whole three hundred pounds, it was ordered that the commissioners settle the value of her life; and that she be admitted a creditor for such valuation, and the arrears of her annuity, it being unreasonable, that she should have the whole three hundred pounds, when she had enjoyed the annuity eighteen years. (s) The same principles are evidently as applicable to a condition of insolvency, as to that of a condition of bankruptcy; and therefore, to abolish a technical distinction which had been introduced by the courts of common law in relation to insolvency, (t) it has been recently enacted in England, that a present value shall, in all such cases, be put upon the annuity, and the annuitant be let in to that amount only as a creditor against the estate of the insolvent. (u)

In 1687, on a bill to be relieved against a conveyance, it appeared, that the plaintiff being entitled to an estate tail, after the death of his father, in lands which, if in possession, were worth, to be sold, about £800, did in 1671, for £30 paid and £20 *per annum*, secured to be paid to him during the lives of him and his father, absolutely convey his remainder in tail to the defendant's father and his heirs. The conveyance was set aside as being an unrighteous bargain in the beginning. (w) In the year 1716, on a bill brought to set aside a sale of a remainder, the case appeared to be, that the plaintiff's father was tenant for life, remainder to the plaintiff in tail, remainder over to a third person; that the plaintiff had married, and had a son. After which the plaintiff being about thirty years of age, and his son ten years old; and when the plaintiff's father was ancient and sickly and in declining life, the plaintiff sold his estate in remainder, which was worth £150, to the defendant for £1,050. The Chancellor decreed relief on the payment of principal, interest and full costs; upon the ground, that the amount paid for the estate in remainder dependant upon so frail a

(s) *Ex parte LeCompte*, 1 Atk. 251; *Ex parte Belton*, 1 Atk. 251; *Bothomly v. Fairfax*, 1 P. Will. 334, note; *Ex parte Artis*, 2 Ves. 490; *Ex parte Carter*, 1 Bro. C. C. 267; *Ex parte Burrow*, 1 Bro. C. C. 268.—(t) *Cotterel v. Hooke*, Doug. 97; *Webster v. Bannister*, Doug. 393.—(u) 1 Geo. 4, c. 119, s. 10; 1 Petersd. Abr. 714, note; *Smith Merca. Law*, 409; *Ex parte Thistlewood*, 19 Ves. 249; *Johnson v. Compton*, 6 Cond. Cha. Rep. 20; *Lyde v. Mynn*, 6 Cond. Cha. Rep. 230.—(w) *Nott v. Johnson*, 2 Vern. 27.

life was so entirely too low as to be evidence of an unconscionable bargain which was altogether unfit to be sustained. (x) In 1734, on a bill to be relieved from an assignment of a legacy, it appeared, that *Andrew Mackean* had, by his will, given a legacy of £500 to his nephew *Martin*, if he should survive the testator's wife *Catharine*, who, by the will, was to have the interest of the £500 for her life, as also the principal in case she should survive *Martin*. The nephew *Martin* was about twenty-four years of age; had led an extravagant life, and had been some time in Newgate. The widow *Catharine* was about sixty-four years old; but as to her health there was a variety of evidence. *Martin* sold his interest on this legacy of £500 to *Cole*; for which *Cole* stipulated to give £100 to be paid in £5 *per annum*, with a proviso, that if *Martin* survived the widow, then what should remain due of the £100, should be paid to him within a year after her death; but if he died in her lifetime, then the £5 *per annum* to continue payable until the £100 should be fully paid. The price thus stipulated to be paid for this legacy, was held to be so much below its real value that the assignment of it would have been set aside as unreasonable, had it not been solemnly and repeatedly confirmed by *Martin*. (y)

It is not unlawful for a remainderman or a reversioner to sell his estate. Such sales are only set aside because of some fraudulent conduct in the purchaser, or because of his having taken some undue advantage of the seller of such an interest. Among other circumstances, inadequacy of price, may, in all such cases, be taken into the consideration as evidence of fraud. But inadequacy of price can only be shewn by making an estimate of the then value of the life estate, and deducting that value from the then price of the inheritance, or the absolute or renewable estate. Some such proportional valuation must have been made in each of these cases, as well as in those which relate to the discharge of mortgages, or other incumbrances; yet there is nothing to be found in the reports of any of them, or in the reports of those which involve the apportionment of incumbrances, or in those which relate to the abatement of specific legacies or to the adjustment of the amount for which an annuitant is to be admitted as a creditor against the estate of a bankrupt or insolvent, before the year 1750, which alludes to any positive rule of apportionment, or that indicates the principles by which the court was governed in putting a present value upon a

(x) *Twisleton v. Griffith*, 1 P. Will. 310.—(y) *Cole v. Gibbons*, 3 P. Will. 290.

life interest of any sort, or of apportioning any burthen between such an estate and a remainder or reversion dependant upon it. (z)

The putting of a present value upon a life annuity, or upon a certain rent for life, or upon a specified annual life income of any description necessarily involves a consideration of the chances of life of the individual during whose life such an annual income is claimed; for although other matters must be taken into consideration in making an estimate of its present value; such as the sufficiency of the security, the probable punctuality of the annual payment, the general demand for the use of money, and the like; yet, it would be difficult to make any calculation as to the duration of a single life without the aid of some general observations as to the rate of mortality, and the probable duration of such lives in like situations. But a judicial controversy as to the present value of a particular life interest, being, in its nature, confined to an insulated subject, however dependant a full understanding and correct determination of it may be upon the doctrine of chances, cannot afford the means of collecting those facts and circumstances on which that doctrine rests, since the doctrine is itself the result of general observations upon those previously collected facts and circumstances, in relation to the duration of human life, whilst the adjudication must necessarily be, if it proceeds upon that doctrine at all, a mere application of it to the peculiar case. Hence it is, that, although judicial investigations may, in such cases, be greatly facilitated by a just application of that doctrine, there is no allusion to any rule for estimating the probable continuance of life to be met with, in any of the reported adjudications, until long after the publication of several essays upon the doctrine of chances in relation to the duration of human life.

Doctor Edmund Halley, an eminent mathematician of England, appears to have been the first who undertook to explain the doctrine of chances in relation to the probable duration of human life. About the year 1690, he published his *Essay on the Determination of the Degrees of Mortality*, in order to adjust the valuation of annuities on lives, founded, as he informs us, upon a table of observations of the births and deaths in the city of Breslaw in Silesia. (a) Soon after, the *Observations on Chronology*, involving similar considerations as to the duration of human life, were published by Sir

(z) *Ryle v. Brown*, 6 Exch. Rep. 265; *Darley v. Singleton*, 6 Exch. Rep. 426.—

(a) *Rees' Cyclo. v. Halley*.

Isaac Newton. (b) In the year 1746, *M. Deparcieux* published his *Observations on the Rate of Mortality* as it occurred among the nominees of two tontines in France, from 1695 to 1740; and on great numbers of monks and nuns in France, who died in the century preceding. (c) Subsequently to which, *Abraham de Moivre*, then of England, published his *Essays on the Doctrine of Chances*, and on Annuities. And it is said, that towards the close of his life, which happened in 1754, he was consulted on all questions relating to chances, gaming, and annuities, and by his answers chiefly subsisted. (d) In the year 1740, *Thomas Simpson*, an eminent English mathematician, published a *Treatise on the Nature and Laws of Chance*; soon after which he published a small volume on the *Doctrine of Annuities and Reversions*, deduced from general and evident principles, with useful tables shewing the values of single and joint lives. And in the year 1752, appeared his work entitled, *Select Exercises for Young Proficients in Mathematics*. (e) In the year 1771, *Doctor Richard Price*, an eminent Englishman, published his celebrated work in relation to this matter, entitled, '*Observations on Reversionary Payments*,' &c. The seventh edition of which enlarged and improved by *William Morgan*, was published in 1812. (f) The public attention, in Great Britain, had not only been thus repeatedly called to this subject, by the publications of these eminent men; but a very great importance had been given to it by the formation, or legal incorporation, from the year 1706 to 1765, of many societies and bodies politic, for the granting of annuities and insurances upon lives; (g) and still more so, by the government's undertaking in 1692; and still continuing to raise revenue by the sale of annuities for life and for years. (h) In reference to which governmental interest in the matter, it has been lately taken up in the House of Commons, and investigated with great care. (i)

In every judicial inquiry, instituted for the purpose of ascertain-

(b) Rees' Cyclo. v. Newton; 1 Niebuhr's Rome, 295; 16 Westm. Rev. 328.—(c) Finlaison's Report, &c. 8; 2 Price Obser. 454.—(d) Rees' Cyclo. v. De Moivre; 9 Westm. Rev. 421.—(e) Rees' Cyclo. v. Simpson.—(f) Since that time Arthur Morgan, in the year 1834, published a set of '*Tables shewing the total number of persons assured in the Equitable Society, (London,) from its commencement in September, 1762, to January, 1829*,' &c.—(g) 1 Price Obser. 72, 97, 104, 109, 119, 142, 158; 9 Westm. Rev. 339.—(h) 4 W. & M. c. 3, s. 18; 5 W. & M. c. 5 and 20; 1 Ann. Stat. 2, c. 5.—(i) The report from the select committee on life annuities, 4 June, 1829; The report of John Finlaison, actuary of the national debt, on the evidence and elementary facts on which the tables of life annuities, constructed by him, are founded, 31 March, 1829.

ing the present value of life interests, it is necessary, in the first place, to determine what may be regarded as the expected duration of the life in question; and in the next place, what is the value, all other circumstances considered, of that specified estate which may be held during the length of time so ascertained. But as has been justly observed, 'the basis of all questions having reference to the failure or continuance of life, is well known to be the law of mortality, or the probability that a human being, who may be in any given year of age, will die in that same year. If this be accurately determined for each and every single year in the natural life of mankind, all other questions whatever, of a financial nature, are capable of precise solution, being merely so many arithmetical results. The said probability, however, can only be arrived at through the experience of what has already happened to a great number of other human beings, all in the very same circumstances with the person whose case is under consideration.' (*j*) It is, therefore, clear, that to form a just estimate of the present value of a life interest, the expected duration of the life upon which it depends must be first ascertained.

In all our inquiries for this purpose, it should be borne in mind, however, that it appears from observations every where, that there is an ultimate term beyond which human life cannot be extended; that the days of our years are threescore years and ten, and if by reason of strength they be fourscore years, yet is their strength labour and sorrow. (*k*) And that the extreme term of existence is not surpassed, because a greater number, under some favourable circumstances, approach it. The boundary seems to have remained impassable since the days of Eli the priest, a period of at least three thousand years, who was ninety and eight years old, and his eyes were dim that he could not see; and he died, for he was an old man and heavy, and had judged Israel forty years. (*l*) Neither does it appear that the ordinary events of forming connexions in marriage, and rearing families at the usual periods of life, have at all varied within the same length of time. (*m*) It must also be recollected, that it has been observed every where and at all times, that although more males than females are born; (*n*) yet from birth (*o*) to old age, through every period of life, even that which is most perilous to females, the time of child-

(*j*) Finlaison's Report, 1.—(*k*) Psalms 90, v. 10; 2 Samuel 19, v. 32.—(*l*) 1 Samuel 4, v. 15–18.—(*m*) Finlaison's Report, 18; 2 Malth. Popu. b. 3, c. 1, pt. 86; Reply to Malth. 247.—(*n*) 2 Price Obser. 105, 127, 128.—(*o*) 2 Price Obser. 106, 131.

bearing, (*p*) the expectation of life is greater in favour of females, than of males. (*q*) There is, however, some reason to believe, that although an unquestionable state of celibacy, as that of the condition of nuns in a convent, has no effect in shortening female life before fifty; yet that after that age the mortality among them becomes more severe. (*r*) So that it must be regarded as an established truth, and a general rule, that there is something in the physical constitution of males more frail and delicate than in those of females; or that, in general, there is a greater degree of tenacity of life in females than in males. (*s*) And it must likewise be borne in mind, that in fixing a general rule, or adjusting a table of the duration of human life, so far as any judicial inquiry is concerned, the object is not to lay down a rule which may be safely or profitably followed by an insurance company, but to establish the truth, which involves nothing more than a consideration of those facts in relation to the actual continuance of human life in the place where the specified life exists, so as to calculate from them a proper average as to its reasonably expected duration.

It seems to be generally admitted, that marriages are not more fruitful now than in past ages, and in stages of society having much less of the comforts, or even of the necessities of life, than at present; that the poor bring forth more children than the rich, but preserve fewer; (*t*) and yet that the population increases much more rapidly in modern than in ancient times. (*u*) These facts only shew, however, that the present is more friendly to human life than the past state of society; and that the probability, as well as the average duration, or mean term of life, as people advance from a savage to a highly civilized state of society, have improved with their improved habits and condition; which has certainly been the case in England, and much more so in France since the revolution in that country. (*w*) The duration of the lives of those who come into existence, is not only very materially affected by the greater abundance of the means of subsistence with the increase and variety of comforts to be had, in a generally improved state of society, but also by the climate and salubrity of the coun-

(*p*) 2 Price Obser. 403, 442.—(*q*) 1 Price Obser. 8, 89, 95, 129, 136, 233; 2 Price Obser. 43; Rees' Cyclo. v. Marriage and Mortality; 9 Westm. Rev. 397, 398; Seybert Stat. An. 44; 2 Southern Rev. 177.—(*r*) Finlaison's Rep. 8; 2 Price Obser. 132.—(*s*) 2 Price Obser. 111, 230.—(*t*) 9 Westm. Rev. 413.—(*u*) 2 Southern Rev. 178; 9 Westm. Rev. 402.—(*w*) 1 Malth. Popu. 52, 335, 401, 413; 1 Price Obser. 182, 186; 9 Westm. Rev. 388, 395, 398, 399; 2 Southern Rev. 175.

try or situation in which such lives happen to be placed, as well as the political causes, such as the arbitrary nature of the government, or the grade of society under which they may be cast. (x) It has been observed, from a very remote period, that the high and mountainous regions of Germany have always been much more healthy than the low margins of its great rivers and sea coasts; (y) and indeed over the whole world the degree of salubrity often varies with a mile of difference in location. It is universally admitted, that large cities are less favourable to the duration of human life than country situations; insomuch so, that great cities have been justly termed 'the sepulchres of the dead and the hospitals of the living.' The difference between the duration of human life in all cities of such magnitude as London, Paris, Vienna, Berlin, and the country, have always, and at all times, been very great. But this difference lessens with the smaller towns; so that, as between mere villages and the country, it is nothing at all. (z)

The expectation of life varies not only with country and place, but also according to the grade and condition of individuals in society; and such variations are most remarkable in those countries in which the grades and conditions are most strongly distinguished. In England as well as in all the other countries of the old world, the expectation of life is greatest in favour of those of the middle classes, and least favourable to those of the aristocratic orders, whose lives are curtailed by their intemperance and debaucheries; (a) and to those of the mere operatives whose lives are shortened by the oppressions and privations under which they suffer. (b) Consequently, a table formed for a whole country collectively, cannot be altogether correct for every particular situation, or for each class of society of the same country.

It often happens however, that in the inquiries which have been made concerning the duration of human life much has been said as to the insalubrity of particular situations; as to the causes, prevalence, and cure of diseases; and also as to the political causes which materially affect the continuance of human life; but with all, or any of those causes, or with the prevention, or removal of any of them, a court of justice, when called upon merely to deter-

(x) 2 Southern Rev. 186.—(y) 1 Malth. Popu. 380; 2 Price Obser. 242.—(z) 1 Price Obser. 127; 2 Price Obser. 30, 33, 45, 49, 65, 83, 127, 218, 226; 1 Malth. Popu. 392; 2 Malth. Popu. 487.—(a) 9 Westm. Rev. 388.—(b) 9 Westm. Rev. 388; 14 Westm. Rev. 390, note; 1 Price Obser. 150; 2 Price Obser. 144; 3 Lond. and Westm. Rev. art. 8; 2 Sparks' Franklin's Works, 324.

mine the present value of a life estate, can have no concern, further than may be necessary to enable it to derive information by analogy.

There are few situations as to which any observations have been made, from which tables have been formed; and yet, without any allowances for differences, those few tables have been used as if they were alike applicable to all times and circumstances. This is a great error. Such tables, as regards other situations, can only be used by way of analogy, and can be relied on, in so far only as it can be shewn, by adverting to all the causes which materially affect human life, that the situation to which the tables are proposed to be applied for information are altogether, or very nearly similar to that for which they were made. Tables shewing the expectation of life at different ages over the whole of Sweden, for instance, could not be followed as safe guides for ascertaining the expectation of life, at the same ages, over the whole of Hindostan. And so too, it would be improper to take the tables of expectation formed for the city of London as rules for ascertaining the expectation of life in Wales. The causes materially affecting the duration of human life, at the time and place for which a table has been made, must, therefore, be understood and compared with those of the place where the life in question exists, before such allowances can be made for the differences, should there be any, as will warrant the use of such table as a means of ascertaining the value of each life.

But, as it is to those tables to which the modern English adjudications refer, in speaking of the means of ascertaining the present value of a life interest, it will be proper to advert to some of the principal circumstances of time and place from which the most approved among them have been formed. It seems, that the formation of tables of the expectation of life, at various ages, calculated from observations made, some time prior to the year 1679, at Breslaw in Lower Silesia, as to the duration of human life, originated with *Dr. Halley*, of England. But it is now admitted, on all hands, that those tables are so imperfect as to be wholly unfit for use; thus leaving to the Doctor no other merit, in this respect, than that of having been the first to shew the use of such tables, and how they might be constructed from correct observations. (c) The next tables are those which may be called the London tables,

formed by *Mr. Simpson* from the bills of mortality for London for ten years, from 1759 to 1768; and as these gave the values of lives among a body of people taken, in the gross, in one of the worst of all situations, they are by no means fit for common use; and are therefore, now never resorted to as a means of ascertaining the value of a life even in London itself. (*d*)

The next set of tables are those formed by *Dr. Price* from bills of mortality kept in the parish of All Saints in the town of Northampton in England, during the years 1735 to 1780. Northampton stands on a high region in the midst of England, and contains at present about eight thousand four hundred inhabitants. It is situated on the river Nen, and is chiefly built on the slope, and near the top of a hill, and is generally clean and pleasant. The parish of All Saints embraces about half the population of the town. (*e*) The next table is that which has been formed for Carlisle, one of the most northerly towns of England. The situation of Carlisle is extremely beautiful; it stands on a gently rising ground in the midst of extensive and fertile meadows, terminated by distant mountains, and watered by the Eden, the Caldew, and the Peterill. The two former of these rivers flow on different sides of the city; and their banks, and contiguous meadows, afford a number of pleasant walks to the inhabitants. Carlisle contains, at present, about ten thousand inhabitants. The degree of salubrity of these two places, Northampton and Carlisle, and the diseases arising from the climate, with which they are visited, may be considered as sufficiently indicated by these concise descriptions of their situations. But it is not stated whether the population was stationary or not at those places when those tables were formed; and yet it is evident, that the migrations or shiftings of the population must necessarily affect all observations of the duration of life made from accounts of births and deaths alone. (*f*) The Carlisle tables were formed from the results of observations made during the years 1779 to 1780, upon a population of eight thousand persons in that place. But it does not appear whether the parish of All Saints in Northampton was inhabited exclusively or disproportionably by rich, or by poor; nor is it said of what class the eight thousand persons of Carlisle were composed. Both of these last mentioned tables are however, evidently formed upon

(*d*) 1 Price Obser. 211; Ree's Cyclo. v. Life Assurance and Mortality.—(*e*) 2 Price Obser. 94.—(*f*) Ree's Cyclo. v. Mortality.

too narrow a basis to be applied to all England; and are the result of observations confined to too short a period of time, and are made without any discrimination whatever as to class, occupation, or sex. It must also be recollected, that the improved condition of the people, since those tables were formed, has added much to the average duration of human life. The Northampton tables are those however, which have been adopted by most of the insurance offices in England, as those upon which they still depend in cases of insurance for lives.

The Equitable Insurance Company of London is said to be the most wealthy and extensive institution of the kind in Europe. This company, from their own observations and experience, have formed tables, such as they have deemed safe to follow, with a view to profit. These tables, called the Equitable Tables, have been often resorted to as guides, and have been from time to time revised by the actuaries of the institution. (g) The next set of tables are those of Sweden, which appear to have been constructed in a very satisfactory manner, upon returns carefully collected in the years 1755 to 1776, and corrected from other returns from the years 1775 to 1796, and from 1801 to 1805, from the population of the whole of Sweden and Finland. These tables may be trusted as accurately exhibiting the chances of mortality amongst the whole population of those two countries, but not the relative chances amongst the different classes of that population. But the climate of those countries, the severe and fatal changes of the seasons, and other peculiarities, influencing health and longevity, differ so greatly from those of most other countries, as to render this set of tables, unaided by other evidences, insufficient for the determination of the exact average mortality amongst the population of any other and different regions. (h)

The last and most recently constructed set of European tables, are those formed about the year 1825, by *John Finlaison*, the actuary of the National Debt Office of England. These tables were deduced from observations upon the life annuitants of the English government, composed of all classes dispersed over all England, and amounting to nearly twenty-five thousand people, during a period of more than thirty years. But, against these tables it may be objected as against those of Sweden, that they appear to be based upon a view of the population of the whole

(g) 9 Westm. Rev. 393.—(h) 1 Malth. Popu. b. 2, c. 2; 9 Westm. Rev. 386.

country, without distinction as to particular places of habitation, or any discrimination as to the people, other than the duration of life of each sex; and also, that those state annuitants may be regarded as a selection of the best lives from the common mass. (i) Nevertheless, these tables of *Finlaison's*, are now considered by many as the most comprehensive, accurate, and generally trustworthy tables extant for England. (j)

The only tables of the expectation of life which have been calculated from any observations in this country are those founded on the results furnished by the records of the Episcopal Church, and of the Board of Health of the city of Philadelphia, which, it is said, have been adopted by the Pennsylvania Company for insurance on lives and granting annuities. (k)

All these tables however, relate simply to the expectation of the life of individuals at various ages, and nothing more. But, in many instances, the annuity, or life interest, is made to depend upon two or more lives of the same or different ages; and, consequently the expectation of each life must be considered, and the case thus becomes more complex; but being deduced from the same known facts, as to each life, an estimate of their joint value is still nothing more than the result of a regular arithmetical calculation according to rules and tables to be found in the books which treat of such calculations.

There are instances, however, in which the annuity or estate is made to depend upon other contingencies, in connexion with that of the expectation of the life of the individual; as where an estate is given to a person to hold until he shall receive an appointment to some office of profit, or so long as he lives unmarried; in which case it is not only necessary to ascertain the expectation of life which may be allowed to the individual; but an additional estimate must be made of his expectation of receiving a profitable appointment, or of his marriage; and then, the value of the two contingencies taken together may be calculated in like manner as in the making of an estimate of the combined value of two or more lives; except, that in the case of two, or more lives, each life adds somewhat to the value of the expectancy, whereas a contingency annexed to a life diminishes its value. There may be very great difficulty in determining the

(i) 2 Price Obser. 454.—(j) 9 Westm. Rev. 398, 403.—(k) Seybert Stat. Ann. 51; Trans. Philo. Soci. Philad. vol. 3, No. 7, p. 25; 2 Malth. Popu. 16.

present value of a life interest subject to such superadded contingency even where there may be nothing in it that contravenes any general legal policy or constitutional provision. (*l*) Nevertheless, let the superadded contingencies be what they may, they do not prevent ascertaining the value; and therefore, they must be valued, if required. (*m*) For although it has been said, that an estate for life, depending upon the contingency of marrying and having issue, is, in general, not the subject of estimate or calculation. (*n*) Yet so far as any observations have been made upon the numbers who marry, and who do not marry, it is as easy, from such observations, to form tables of the expectation of marriage as of life; and both may thus be alike made the subject of estimate and calculation. (*o*) It is by no means uncommon to grant annuities and estates for life during widowhood, until marriage, or depending on marriage and having issue; (*p*) yet few observations have been made on the probabilities of marriage.

About the year 1825, *Dr. Grenville*, a physician and accoucheur of very extensive practice connected with the Westminster Dispensary, and several other public institutions in or near London, on being called as a witness before a committee of the House of Commons, stated, that his attention had been frequently directed to the statistical questions of the increase of population among the poor; and that therefore, availing himself of his various means of information, he had made an analytical register in which he had entered the information he had obtained from mothers. He exhibited a register of the cases of eight hundred and seventy-six women, all of the lower classes, showing how many of that number had married in each year, from thirteen to thirty-nine years of age. Considering the state of society in England, the remark would seem to be just, that among an equal number from the middling, or the higher classes, we should not probably find so many as one hundred and ninety-five, or more than one-fifth married under the age of nineteen; or so few as one-sixteenth part,

(*l*) Const. Maryl. art. 54; *Heathcote v. Paignon*, 2 Bro. C. C. 170; *Kircudbright v. Kircudbright*, 8 Ves. 51.—(*m*) *Kircudbright v. Kircudbright*, 8 Ves. 64.—(*n*) *Ardglasse v. Muschamp*, 1 Vern. 238; *Wiseman v. Beake*, 2 Vern. 121; *Nichols v. Gould*, 2 Ves. 423; *Bowes v. Heaps*, 3 Ves. & Bea. 120; *Baker v. Bent*, 4 Cond. Chan. Rep. 398; S. C. 5 Cond. Chan. Rep. 432; *Portmore v. Taylor*, 6 Cond. Chan. Rep. 101, note.—(*o*) 1 Price Obser. 45, 86, 88; 2 Price Obser. 105, 118.—(*p*) *Henley v. Axe*, 2 Bro. C. C. 17; *Davis v. Marlborough*, 2 Swan. 149, note.

after twenty-eight; or only one-thirtieth part, after thirty, as is shewn by the table of *Dr. Grenville*. (q)

From all these various tables I have extracted so much as relates to the expectation of life shewn by each, and placed it in a separate column opposite to a column of ages, so as, in this respect, to exhibit in one general table a comparative view of all of them, together with a column shewing the number out of eight hundred and seventy-six females, who were married at the several ages as stated by *Dr. Grenville*. It should be recollected, however, that in the language of mathematicians, who treat of this matter, the *probabilities* of life, and the *expectation* of life, are different. By the *probabilities* of life is meant the likelihood, that all who are born in any particular place or country, or that of any given number born, so many will be found alive at any given age; as, for example, according to *Dr. Halley's* tables, out of one thousand persons born, only five hundred and ninety-eight will live to reach the twentieth year of their age; but according to the London tables, of the same number born, three hundred and sixty will reach that age; thus exhibiting a view of the waste of life from birth to that age. By the *expectation* of life is meant, that particular number of years which a life of a given age has an equal chance of enjoying; or the time that such a person may reasonably expect to live. Tables shewing the expectation of life are formed from those showing the probabilities of life. (r)

(q) 9 Westm. Rev. 417.—(r) 2 Price Obser. 4, 251, 254, 290, 297.

A Table shewing the Expectations of Life.

Age.	London.	Northampton.	Carlisle.	Leicestershire.	Swedish.		Finlaison's.		Philadelphia.		Of 876 females married.	Age.
					Males.	Females.	Males.	Females.	Church.	Board of Health.		
0	19.2	25.18	38.72		37.82	41.01	50.16	55.51				0
1	27.0	32.74	44.68		46.26	48.60	50.13	55.59	30.91	25.96		1
2	32.0	37.79	47.55		48.12	50.28	50.04	55.37	34.43	32.92		2
3	34.0	39.55	49.82		48.84	50.90	49.80	55.05	35.74	36.80		3
4	35.6	40.58	50.76		49.05	51.15	49.42	54.65	37.30	36.85		4
5	36.0	40.84	51.25		48.99	51.04	48.93	54.23	37.91	36.94		5
6	36.0	41.07	51.17		48.80	50.79	48.36	53.72	38.60	37.02		6
7	35.8	41.07	50.80		48.60	50.38	47.71	53.15	38.24	36.42		7
8	35.6	40.79	50.24		47.91	49.78	47.02	52.50	37.80	35.85		8
9	35.2	40.36	49.57		47.30	49.23	46.30	51.80	37.50	35.23		9
10	34.8	39.78	48.82	43.73	46.68	48.55	45.57	51.05	37.12	34.59		10
11	34.3	39.14	48.04	43.06	45.95	47.83	44.83	50.27	36.74	33.95		11
12	33.7	38.49	47.27	42.39	45.21	47.09	44.07	49.45	36.09	33.20		12
13	33.1	37.83	46.51	41.71	44.59	46.00	43.31	48.70	35.43	32.44	3	13
14	32.5	37.17	45.75	41.03	43.67	45.51	42.53	47.93	34.77	31.68	11	14
15	31.9	36.51	45.00	40.35	42.88	44.72	41.75	47.19	34.10	30.92	16	15
16	31.3	35.85	44.27	39.68	42.11	43.95	41.01	46.51	33.43	30.16	43	16
17	30.7	35.20	43.57	39.01	41.34	43.18	40.29	45.86	32.73	29.38	45	17
18	30.1	34.53	42.87	38.34	40.57	42.73	39.61	45.22	32.02	28.60	76	18
19	29.5	33.99	42.17	37.68	39.79	41.62	38.98	44.60	31.31	27.82	115	19
20	28.9	33.43	41.46	37.05	39.05	40.90	38.39	43.99	30.60	27.04	118	20
21	28.3	32.90	40.75	36.45	38.32	40.05	37.83	43.36	29.88	26.25	56	21
22	27.7	32.39	40.04	35.88	37.61	39.16	37.34	42.73	29.40	24.57	85	22
23	27.2	31.88	39.31	35.32	36.91	38.66	36.87	42.09	28.93	25.19	59	23
24	26.6	31.36	38.59	34.78	36.19	37.91	36.89	41.45	28.46	24.67	53	24
25	26.1	30.85	37.86	34.24	35.48	37.17	35.90	40.81	27.99	24.14	36	25
26	25.6	30.33	37.14	33.70	34.75	36.43	35.41	40.17	27.50	23.61	24	26
27	25.1	29.82	36.41	33.16	34.68	35.69	34.86	39.52	27.00	23.08	28	27
28	24.6	29.30	35.69	32.62	33.30	34.96	34.31	38.87	26.50	22.55	22	28
29	24.1	28.79	35.00	32.07	32.57	34.22	33.75	38.22	25.99	22.01	17	29
30	23.6	28.27	34.34	31.52	31.85	33.49	33.17	37.57	25.50	21.48	9	30
31	23.1	27.76	33.60	30.97	31.12	32.77	32.59	36.91	24.99	20.93	7	31
32	22.7	27.24	33.03	30.40	30.39	32.04	32.00	36.26	24.59	20.65	5	32
33	22.3	26.72	32.36	29.84	29.66	31.33	31.40	35.61	24.19	20.40	7	33
34	21.9	26.20	31.68	29.26	29.07	30.61	30.79	34.96	23.80	20.16	5	34
35	21.5	25.68	31.00	28.66	28.20	29.90	30.17	34.31	23.40	19.95	2	35
36	21.1	25.16	30.32	28.07	27.48	29.19	29.54	33.68	23.01	19.76	0	36
37	20.7	24.64	29.64	27.47	26.75	28.48	28.91	33.04	22.64	19.57	2	37
38	20.3	24.12	28.96	26.86	26.03	27.77	28.28	32.04	22.23	19.40	0	38
39	19.9	23.60	28.28	26.26	25.32	27.26	27.65	31.76	21.83	19.25	1	39
40	19.6	23.08	27.61	25.65	24.62	26.35	27.02	31.12	21.44	19.15		40
41	19.2	22.56	26.97	25.04	23.93	25.65	26.39	30.46	21.05	19.09		41
42	18.8	22.04	26.34	24.42	23.24	24.97	25.74	29.81	20.80	18.87		42
43	18.5	21.54	25.71	23.80	22.56	24.47	25.08	29.14	20.22	18.54		43
44	18.1	21.03	25.09	23.18	21.87	23.61	24.42	28.48	19.82	18.18		44
45	17.8	20.52	24.46	22.55	21.18	22.92	23.75	27.81	19.42	17.91		45
46	17.4	20.02	23.82	21.92	20.51	22.21	23.07	27.13	18.99	17.64		46
47	17.0	19.51	23.17	21.29	19.84	21.49	22.38	26.44	18.55	17.44		47
48	16.7	19.00	22.50	20.65	19.18	20.77	21.63	25.75	18.14	17.24		48
49	16.3	18.49	21.81	20.01	18.53	20.06	20.98	25.06	17.73	17.02		49
50	16.0	17.99	21.11	19.37	17.90	19.37	20.30	24.35	17.32	16.82		50
51	15.6	17.50	20.39	18.73	17.30	18.70	19.62	23.65	16.92	16.66		51
52	15.2	17.02	19.68	18.10	16.72	18.05	18.97	22.93	16.52	16.31		52
53	14.9	16.54	18.97	17.48	16.14	17.39	18.34	22.22	16.13	15.97		53
54	14.5	16.06	18.28	16.87	15.55	16.74	17.73	21.50	15.75	15.64		54
55	14.2	15.58	17.58	16.28	14.97	16.08	17.15	20.79	15.40	15.33		55
56	13.8	15.10	16.89	15.70	14.37	15.45	16.57	20.08	15.04	14.97		56

Age.	London.	Northampton.	Carlisle.	Equitable.	Swedish.		Finlaison's.		Philadelphia.		Of 876 females married.	Age.
					Males.	Females.	Males.	Females.	Church.	Board of Health.		
57	13.4	14.63	16.21	15.14	13.80	14.82	16.02	19.38	14.68	14.62		57
58	13.1	14.15	15.55	14.59	13.25	14.20	15.47	18.69	14.35	14.31		58
59	12.7	13.68	14.92	14.05	12.70	13.58	14.93	18.00	14.04	14.00		59
60	12.4	13.21	14.34	13.53	12.17	12.98	14.39	17.32	13.75	13.71		60
61	12.0	12.75	13.82	13.02	11.66	12.40	13.84	16.64	13.48	13.44		61
62	11.6	12.28	13.31	12.52	11.15	11.84	13.28	15.96	13.04	13.06		62
63	11.2	11.81	12.81	12.03	10.64	11.30	12.72	15.30	12.60	12.68		63
64	10.8	11.33	12.30	11.50	11.11	10.76	12.17	14.64	12.17	12.25		64
65	10.5	10.85	11.79	11.07	9.60	10.16	11.63	14.00	11.70	11.82		65
66	10.1	10.42	11.27	10.59	9.11	9.69	11.10	13.37	11.23	11.41		66
67	9.8	9.86	10.75	10.17	8.61	9.18	10.61	12.76	10.76	11.00		67
68	9.4	9.50	10.23	9.64	8.14	8.67	10.14	12.16	10.30	10.60		68
69	9.1	9.05	9.70	9.16	7.68	8.17	9.67	11.57	9.83	10.21		69
70	8.8	8.60	9.18	8.69	7.25	7.69	9.22	10.99	9.37	9.83		70
71	8.4	8.17	8.65	8.23	6.88	7.25	8.79	10.44	8.92	9.48		71
72	8.2	7.74	8.16	7.77	6.50	6.85	8.37	9.92	8.54	9.15		72
73	7.8	7.33	7.72	7.31	6.16	6.47	7.96	9.41	8.16	8.84		73
74	7.5	6.92	7.33	6.87	5.82	6.11	7.54	8.92	7.75	8.47		74
75	7.2	6.54	7.01	6.43	5.50	5.78	7.12	8.46	7.43	8.23		75
76	6.8	6.18	6.69	6.00	5.22	5.39	6.69	8.00	7.06	7.78		76
77	6.4	5.83	6.40	5.59	4.94	5.10	6.23	7.58	6.72	7.50		77
78	6.0	5.48	6.12	5.20	4.51	4.80	5.78	7.19	6.40	7.25		78
79	5.5	5.11	5.80	4.83	4.41	4.50	5.35	6.83	6.15	7.07		79
80	5.0	4.75	5.51	4.50	4.09	4.22	4.94	6.50	5.95	6.97		80
81		4.41	5.21	4.20	3.86	3.98	4.55	6.20	5.86	7.00		81
82		4.09	4.93	3.91	3.67	3.77	4.18	5.89	5.40	6.65		82
83		3.80	4.65	3.65	3.50	3.55	3.82	5.57	4.94	6.33		83
84		3.58	4.39	3.43	3.36	3.40	3.46	5.22	4.50	6.00		84
85		3.37	4.12	3.23	3.23	3.23	3.12	4.84	4.07	5.85		85
86		3.19	3.90	3.02	3.07	3.16	2.81	4.44	3.66	5.50		86
87		3.01	3.71	2.82	2.95	3.01	2.53	4.03	3.30	5.17		87
88		2.86	3.59	2.58	2.78	2.83	2.31	3.62	3.00	4.92		88
89		2.66	3.47	2.37	2.68	2.57	2.12	3.21	2.83	4.75		89
90		2.41	3.28	2.19	2.50	2.26	1.95	2.83		4.73		90
91		2.09	3.26	2.10	2.38	2.06	1.83	2.49				91
92		1.75	3.37	1.90	2.18	1.83	1.65	2.21				92
93		1.37	3.48	1.65	1.96	1.75	1.49	1.97				93
94		1.05	3.53	1.37	1.87	1.72	1.34	1.75				94
95		0.75	3.53	1.25	1.70	1.70	1.18	1.55				95
96		0.50	3.46	1.00	1.50	1.50	0.97	1.32				96
97			3.28	0.50	1.00	1.00	0.75	1.12				97
98			3.07				0.50	0.94				98
99			2.77					0.75				99
100			2.28					0.50				100
101			1.79									101
102			1.30									102
103			0.83									103
	(s)	(t)	(u)	(w)		(x)		(y)		(z)	(a)	

(s) Rees' Cyclo. v. Expectation.—(t) 2 Price Obser. 313.—(u) 9 Westm. Rev. 403.

(w) This column is taken from a folio pamphlet, entitled 'Tables shewing the total number of persons assured in The Equitable Society, from its commencement in September, 1762, to January 1st, 1829, &c. To which are added Tables of the probabilities and expectation of the duration of human life from these documents, &c.,' by Arthur Morgan, the then Actuary of the Society, published in the year 1834. In the introduction prefixed to these Tables, after stating, that the expectations, as here set down, are the most correct, Mr. Morgan adds, 'It has the advantage also of being the *safer* Table of the two for most of the practical purposes of a Life Assurance Office, giving the probabilities and expectations of life somewhat lower than those deduced from the mortality of separate classes, in a few cases where these latter have been sufficiently numerous to form some estimate.'—(x) 9 Westm. Rev. 403.—(y) 9 Westm. Rev. 403.—(z) Seybert's Stat. Ann. 51.—(a) 9 Westm. Rev. 419.

A case which was determined, after much deliberation, about the year 1750, appears to have been the first in which any allusion was made, in the courts of Westminster Hall, to the mode adopted by eminent mathematicians for ascertaining the present value of a life interest of any kind; (b) which mode, however, after that time seems to have been well understood; and has been often referred to in those courts. (c) It would seem, that so early as 1759, the arbitrary rule of considering an estate for life in land, as equivalent in value to one-third of the whole, was not implicitly followed. (d) In 1785, the rule was put aside as unjust; and each interest directed to be valued according to its actual worth, and in due proportion. (e) In the year 1787, it appears, that among other kinds of evidence, tables shewing the expectation of life were resorted to as a means of ascertaining the value of a life interest; (f) and it was declared, that the division which the court had formerly made of a burthen upon the whole, of one-third to the tenant for life, had been found to be arithmetically wrong, though the principle, that it should be borne in proportion, was right. (g) In the year 1798, this matter having been again submitted for consideration, the old rule was entirely exploded; and it was declared, that the doctrine of charging one-third upon the tenant for life could not hold, and was not to be applied in any case. That it was a most unreasonable and absurd rule; for, it being admitted, that every person should contribute according to his interest, a man of the age of eighty, with, perhaps, not a year to live, must be said to have as much interest as one of twenty. (h)

The matter, it is said, had, in some of the cases determined prior to the year 1804, been very anxiously, frequently and gravely considered, although it does not appear from the reports of them; because of the intricacy of the subject, and of its not being easy to follow a discussion upon so difficult a question in which such great nicety of fact and calculation were involved. And it was then finally laid down, as a general rule in all cases, where a present value was to be put upon an annuity for life, or any other life interest in property, as well as where a burthen was to be borne by an entire estate which was held by a particular tenant, and a

(b) *Chesterfield v. Janssen*, 2 Ves. 127.—(c) *Nichols v. Gould*, 2 Ves. 423.—(d) *Lawrence v. Maggs*, 1 Eden, 453; *Pickering v. Vowles*, 1 Bro. C. C. 198.—(e) *Nightingale v. Lawson*, 1 Bro. C. C. 440; S. C. 1 Cox, 181.—(f) *Heathcote v. Paignon*, 2 Bro. C. C. 167; *Griffith v. Spratley*, 1 Cox, 389.—(g) *Stone v. Theed*, 2 Bro. C. C. 243.—(h) *White v. White*, 4 Ves. 24; *Penrhyn v. Hughes*, 5 Ves. 107.

remainderman, or reversioner, that the estimate must be made with reference to the then actual nature of the life; and, that an apportionment of the burthen must be adjusted between the several holders of the estate, so that, if the particular tenant was bound to pay in any degree, he was made to pay in proportion to the benefit he in fact took under the transaction; and that the remainderman, or reversioner, was made to pay with reference to his proportion of the benefit; which estimate and adjustment must be made upon facts, not upon mere speculation. (i)

In applying this rule for estimating the value of an estate for life, or in order to make an apportionment between the several owners of a real estate, it appears, that the English courts of justice have, latterly, in almost all cases, sought assistance from the tables formed by mathematicians of the expectation of life, without receiving them, except, perhaps, in the case of the distribution of the assets of a deceased person's estate; (j) as in any respect conclusive. (k) Because, as a basis for all those tables a certain average rate of mortality being established or assumed, they are then the result of calculations upon mere age, taking all lives of the same age to be of equal value, considering none as bad, that are ordinarily good. But the constitutions of individuals differ essentially; the health of the same individual may have been materially affected by accident or climate; or he may have a latent disease which has in a greater, or less degree, affected his duration of life for many years. All such circumstances must be taken into consideration; and, therefore, no ordinary table of the expectation of life, although it may afford much useful information, can alone be taken as giving a correct general rule for estimating the value of the life of any particular individual. (l)

In cases of pensions or annuities for life granted by government; in cases of a life interest in land, not chiefly valuable because of

(i) *White v. White*, 9 Ves. 554; *Allan v. Backhouse*, 2 Ves. & Bea. 78.—(j) *Ex parte Thistlewood*, 19 Ves. 250.—(k) *Heathcote v. Paignon*, 2 Bro. C. C. 167; *Griffith v. Spratley*, 1 Cox, 389; *Evans v. Cheshire*, Belt's Supp. to Ves. 306; *Gowland v. De Faria*, 17 Ves. 25; *Ex parte Thistlewood*, 19 Ves. 236; *Ex parte Whitehead*, 1 Meriv. 127; *Davis v. Marlborough*, 2 Swan. 147; *Portmore v. Taylor*, 6 Cond. Chan. Rep. 104; *Newton v. Hunt*, 7 Cond. Chan. Rep. 518; *Wardle v. Carter*, 10 Cond. Chan. Rep. 163; *Ryle v. Brown*, 6 Exch. Rep. 265.—(l) *Gwynne v. Heaton*, 1 Bro. C. C. 2; *Heathcote v. Paignon*, 2 Bro. C. C. 167; *Gibson v. Jeyes*, 6 Ves. 274; *Ex parte Thistlewood*, 19 Ves. 236.

the houses erected upon it, where the title is unquestionable; and in cases of setting a value upon a life interest in land in proportion to the estate in remainder or reversion in the same land under the same title, no contingencies, affecting its value, need be considered other than those of the expectation of the life. But, in making an estimate of the value of other kinds of life interests, there are other circumstances to be attended to besides the uncertainty of the life during which they were to be held; the frailties of the securities by which they are to be sustained during that time must also be considered. For instance, what an annuity is worth depends, in a great degree, upon the security given for its regular payment; and in examining that security it will be proper, not only to consider the pecuniary circumstances of the grantor; but his expectation of life, the hazardous nature of the business in which he may be engaged; (*m*) and also his prudence; for, although he may, at the time, be in circumstances altogether unexceptionable; yet his death, his misfortunes, or his indiscretion in the management of his affairs may, in a short time, greatly impair, or totally destroy the security for the payment of the annuity. In these respects therefore, an annuity granted by a legally incorporated company must, in general, be considered as of much greater value than one of the same amount depending upon personal security alone; because there is a steadiness in the transactions of such bodies politic which, being the foundation of their credit, gives a value to their security greater than that of an individual. (*n*)

In addition to all these various circumstances relative to the expectation of life, and the securities by which a life interest is to be continued and sustained, it will be necessary moreover to ascertain the annual product of the life interest in order to make a proper estimate of its present value; for, apart from those things having an imaginary value, such as jewels and the like, the true criterion of the value of all property is the actual profit it may be made to produce; and hence, it has always been considered most correct to estimate the value of lands, annuities, &c. at so many years purchase; or, in other words, that the whole estate may be estimated as equivalent to so many years of its income paid at the time of the purchase. (*o*) There is almost every where a material

(*m*) Ringgold's Case, 1 Bland, 26.—(*n*) Gibson v. Jeyes, 6 Ves. 274, 279; *Ex parte* Thistlewood, 19 Ves. 236.—(*o*) Freemoult v. Dedire, 1 P. Will. 429; Flud v. Flud, 2 Freem. 210; Badger v. Badger, Mosely, 117; Barnardiston v. Lingood, 2

difference between the amount of the annual legal interest on the purchase money of a fee simple estate in land and the annual amount of rents and profits. But to ascertain the amount of the legal interest on the purchase money of an estate, the amount of the purchase money itself must be first ascertained, which, without an actual sale, can only be done as a matter of opinion; and, therefore, as a guide to such an opinion reference is always had to the amount of its annual income; and as regards an estate for life in land the annual rents and profits afford the only means of making a correct estimate of its value. (*p*)

In making an estimate of the value of such an estate, there is, however, a material distinction between a tenant for life who is, and one who is not liable to impeachment for waste. A tenant for life, subject to impeachment of waste, cannot sell the timber growing on the estate, nor take the produce of mines unopened, both of which are the property of the person entitled to the inheritance; yet in cases where the estate has been sold to pay debts, the court, it is said, has given a life estate in the whole interest of the surplus money to the tenant for life, although the sum is increased

Atk. 135; *Gwynne v. Heaton*, 1 Bro. C. C. 2; *Heathcote v. Paignon*, 2 Bro. C. C. 167; *Griffith v. Spratley*, 1 Cox, 389; *Gibson v. Jeyes*, 6 Ves. 268; *Peacock v. Evans*, 16 Ves. 512; *Ex parte Thistlewood*, 19 Ves. 253; *Chalmer v. Bradley*, 1 Jac. & Walk. 59; *Oliver v. Court*, 3 Exch. Rep. 320; *Ryle v. Brown*, 6 Exch. Rep. 265.

Vulpean, in the time of the Emperor Justinian, A. D. 529, estimated the values of annuities as follows.—(*Pandect*. 35. 2. 68.)

Age. *Years of purchase.*

Under 20	30
20 to 25	28
25 to 30	25
30 to 35	22
35 to 40	20
at 41	18
42	17
43	16
44	15
45	14
46	13
47	12
48	11
49	10
50 to 55	9
55 to 60	7
above 60	5

It is uncertain whether in this computation he made any allowance for discount, or something equivalent in meaning; or whether, as is much more probable, this was his notion of the number of years which a life at each age was likely to live. If the latter be the meaning, the Romans must have had but a miserable chance of life in old age.—(*Finlaison's Rep.* 19, *note*.)

(*p*) *Badger v. Badger*, *Mosely*, 117; *Peacock v. Evans*, 16 Ves. 516.

by that which belonged to the inheritance, either as the price of the standing timber which the tenant for life could not cut, or as the price of the remainder or reversion from which the tenant for life could have derived no profit; and therefore, it would seem to be clearly improper to award to him the interest upon any portions of the purchase money which represent those prices. (*q*)

There is yet one other matter which must be attended to, and that is, as to the point of time at which the valuation of the life interest is to be made. A valuation as of the time when it arose would, in many cases, give to the tenant for life its greatest value after he had enjoyed it many years; and therefore, it would seem to be most correct to have the valuation put upon it at that point of time when it was to be taken away or extinguished; as in cases of dower, &c., at the time when the land was sold free of such claim; or where the life interest had been withheld, at the date of the order, by which a sum in gross was directed by the court to be given in place of it; leaving the previous income which had, or might have accrued, and should have been paid, to be accounted for as rents and profits. But where an annuity had been given to a child as an advancement, it was said, if it should be brought into hotchpot after the death of the parent, that a valuation ought to be put upon it as of the day when it was granted; and so too, where a party comes as an expectant heir to set aside the contract on the ground of fraud and inadequacy of price, the valuation is to be calculated as of the day of the original transaction. (*r*)

But this whole matter, as well in regard to the expectation of life and the nature of the securities to support the life interest, as in regard to the exact point of time at which the valuation is to be adjusted, seems as yet, in England, to remain unsettled by any positive general rule. (*s*)

There are some cases, however, in which it has not been deemed necessary to put a present value upon the entire particular estate in comparison with that of the inheritance, in order to adjust the proportions in which the burthen should be borne by each. As in

(*q*) *Ex parte Artis*, 2 Ves. 490; *Tracy v. Hereford*, 2 Bro. C. C. 138; *Davis v. Marlborough*, 2 Swan. 151, 153, note; *Oliver v. Court*, 3 Exch. Rep. 330; *Attersoll v. Stevens*, 1 Taunt. 183; *Maccubbin v. Cromwell*, 2 H. & G. 460.—(*r*) *Ex parte Le Compte*, 1 Atk. 251; *Ex parte Belton*, 1 Atk. 251; *Kircudbright v. Kircudbright*, 8 Ves. 63; *Gowland v. De Faria*, 17 Ves. 24.—(*s*) *Butcher v. Churchill*, 14 Ves. 574; *Ex parte Thistlewood*, 19 Ves. 236; *Ex parte Whitehead*, 1 Meriv. 10 and 127.

the case of a real estate under an incumbrance, it is held, that the tenant for life in possession must keep down the interest of the debt. For although the whole is liable to the creditors; yet as between the tenant for life and him in remainder, it is said to fall in with natural justice, that those who have a divided interest of an estate, should keep down the burthen during their own time; and therefore, by a construction in equity, the tenant for life is held bound to keep down the interest to the whole amount of the rents and profits; as otherwise the creditor may come upon his life estate for the principal. Whence it seems to have been taken for granted, as a general understanding, and as a natural apportionment, in all such cases, that he who has the *corpus* shall take the burthen; and he who has only the fruit shall pay to the extent of the fruit of that debt; (*t*) or in other words, that the rents and profits of the incumbered estate must have been specially intended to meet and keep down the interest of the debt, leaving the principal only to be treated as an incumbrance upon the inheritance, or chief body of the estate. For it must be always remembered, that the tenant for life and the incumbrancers may at any time have the estate sold; and, after satisfying the debt, have the surplus, if any, apportioned among the tenant for life and the remainderman according to their respective interests. (*u*) This rule compelling a tenant for life to discharge the interest of mortgages and other real incumbrances, applies as well to tenants for years, (*w*) to tenant in dower, and a tenant by the courtesy, as to all other kinds of tenants for life; (*x*) except, that as to the dowress, she, being entitled but to one-third of the estate during her life, will not be compelled to keep down more than one-third of the interest of any charges affecting the real estate in which she is entitled to dower; (*y*) and as to her share of the principal, supposing that in order to be let into her dower she is obliged to redeem the whole mortgage, it is conceived, that she would have a claim on the estate for two-thirds of the interest, and the whole of the principal. (*z*)

(*t*) *White v. White*, 9 Ves. 560.—(*u*) *Hungerford v. Hungerford*, Gilb. Eq. Rep. 69; *Revel v. Watkinson*, 1 Ves. 93; *Amesbury v. Brown*, 1 Ves. 477; *Saville v. Saville*, 2 Atk. 463; *Penrhyn v. Hughes*, 5 Ves. 107; *Powel Mortg.* 921, note H.—(*w*) *Amesbury v. Brown*, 1 Ves. 480.—(*x*) *Peterborough v. Mordaunt*, 1 Eden, 478; *Tracy v. Hereford*, 2 Bro. C. C. 128; *Shrewsbury v. Shrewsbury*, 3 Bro. C. C. 126; S. C. 1 Ves., jun., 227; *Bertie v. Abingdon*, 3 Meriv. 560; *Burgess v. Mawbey*, 11 Cond. Cha. Rep. 96.—(*y*) *Banks v. Sutton*, 2 P. Will. 716.—(*z*) *Palmer v. Danby*, Prec. Chan. 137; *Powel Mort.* 923, note; 1 Mad. Chan. 238.

I am not aware that any observations have been made any where in the United States, as to the average rate of mortality, from which a table of the expectation of human life at the various ages could be formed ; except those before mentioned of the city of Philadelphia. A sensible writer has, however, intimated, that he had, for some years, been endeavouring to collect data upon which to found a calculation of the average duration of life in the southern Atlantic states, comprising Georgia, the Carolinas, and Virginia. (a) But as it would seem the only materials which have, as yet, been collected which would be likely to afford any aid in the formation of such a table, are the few and imperfect bills of mortality which have been kept in some of the cities ; (b) the reports of the surgeons of the army as to the health of the troops at the places where detachments of them have been stationed, the pension list, and the census of the Union.

The Roman census was a numbering of the people with a valuation of their fortunes ; which, although said to have been made every five years, was not always taken at certain intervals ; and was sometimes omitted altogether. It does not, however, appear to have been, in fact, an enumeration of all the inhabitants, but was merely a numbering and classing of the citizens of Rome, and of the colonial cities ; (c) and, being commensurate with property, power, and taxation, seems to have been, in many respects, more like what, in Maryland, is called an assessment law for the valuation of real and personal property for the purpose of taxing it, than such a census as is directed to be taken by the constitution of the United States. (d) It is said that a census of the inhabitants of England was taken in the time of Henry the 8th, the returns of which have been lost. (e) In the year 1753, a bill was presented to the House of Commons proposing to have a census taken of the people of England, but was rejected. (f) Since that time, however, there have been three census taken, one in 1801, another in 1811, and a third in 1821. (g) Before the adoption of the present constitution of the United States, Congress repeatedly recommended to the several states to take measures to ascertain the number of their inhabitants ; (h) with which recommendation

(a) 2 Southern Review, 175.—(b) Seybert Stat. Ann. 49.—(c) Adams' Rom. Ant. 89, 134.—(d) Gibbon's Decl. and Fall Rom., c. 2, c. 6, and c. 17 ; 1 Niebuhr's Hist. Rome, 340, 347.—(e) Seybert Stat. Ann. 17.—(f) Smollet's Hist. Eng. ch. 8.—(g) Miller's His. Gr. Brit. 470, 569 ; Seybert Stat. Ann. 25, 28 ; 8 Amer. Quart. Review, 388.—(h) Journ. Cong. 26 December, 1775 ; 1 April, 1782 ; 17 February, 1783 ; 24 September, 1785.

Maryland and some other of the states complied. By an act of the General Assembly of Maryland, the assessors and commissioners of the tax of the several counties were directed to make returns of the number of inhabitants in their respective counties to the clerk of the house of delegates; (*i*) which returns, if ever made, are now lost. But it is believed, that in no country has there ever been taken a regular and periodical enumeration of all the people, like those taken under the constitution of the United States. (*j*) The census thus required to be taken every tenth year, might be so ordered as to collect a great variety of the most authentic and useful information, shewing, among other things, the average rate of mortality in each state, and indeed in each county of every state in the Union, as well as such other matters as are more immediately connected with its political objects. But hitherto little more has been done than to have returns made of the numbers of free persons and of slaves within certain specified ages. (*k*)

From such information, however, as we possess, it may be confidently assumed, that the average rate of mortality is, in general, not greater here than in any part of Europe; and that taking into consideration all political and natural causes, as compared with England, in this respect, the most favoured portion of Europe, (*l*) the circumstances of these United States are, in general, fully as favourable to the duration of human life as any other country of the world. For, after making the largest allowance for the accessions to our numbers by emigration; (*m*) and for the greater number of marriages here than elsewhere, it will be found, that in no country has the population increased so rapidly as in the United States. Marriages, although earlier and more numerous, are, on an average, not much more fruitful here than in other countries. (*n*) And the general ultimate term of human existence, although extended here as far as any where, not having been materially enlarged, the rapid increase of our population can only, therefore, be accounted for by admitting it to be a fact, that of those born here a greater proportion approximate to the ultimate term of life than in any other country; or, in other words, that the rapid du-

(*i*) 1785, ch. 83, s. 25.—(*j*) Seybert Stat. Ann. 17.—(*k*) 2 Price Obser. 54, 210; 1 Malthus Popu. 457, note, 476; Seybert Stat. Ann. 17, 19.—(*l*) 2 Southern Rev. 153; 1 Malthus Popu. 477.—(*m*) Seybert Stat. Ann. 28, 30.—(*n*) 2 Sparks' Franklin's Works, 313; 2 Price Obser. 42; 2 Malthus Popu. b. 2, c. 9; 9 Westm. Rev. 419.

plication of our population is more owing to a diminished mortality than to an increased number of births, or to any accessions from emigration. (o) This, however, is only a general conclusion deducible from the several enumerations of the inhabitants of the whole Union, which might not be alike applicable to every state, or even to any larger division of the confederacy. But it is a general conclusion which will be found to be mainly corroborated by a comparison of some of the principal causes affecting human life here, with those of a similar nature in other countries. Among citizens our government admits of no political distinctions; there are no aristocratic or religious classes hanging as a dead weight upon the rest of the community. There being fewer drones, and a larger proportion of active producers, the necessities and comforts of life are more abundant, and more generally and equally diffused here than in any of the European nations. In addition to which the soil of our country being more fertile, and a greater proportion of it fit for cultivation, than that of Europe, the means of subsistence may be obtained here in larger measures with less labour than there; insomuch so, that no one has yet ventured to predict when our population will be so numerous as to have its further increase checked by the want of food. (p)

In the year 1751, it was estimated, that there were upwards of one million of English souls within the territory of the then colonies, afterwards thirteen United States, although it was thought, that scarce eighty thousand had been brought over sea. (q) In the year 1775, the population of all the United States was estimated to be about two millions and an half; (r) and by the first census, taken in the year 1790, the Union was found to contain a population of three millions nine hundred and twenty-one thousand three hundred and twenty-six. Compared with the second and third enumerations it was calculated, that the population doubled in a term of less than twenty-three years, while it appeared from the most authentic information, that a duplication of the population of Great Britain would not take place in less than eighty years. (s)

But however desirable it may be to obtain correctly formed tables of the expectation of life, as a means of estimating the value

(o) 2 Price Obser. 51; 1 Malthus Popu. 386.—(p) Darby's View U. States, 434; Seybert Stat. Ann. 51, 52; 2 Sparks' Franklin's Works, 311; 2 Malthus Popu. 53.—(q) Spark's Franklin's Works, 319.—(r) Seybert Stat. Ann. 17; 1 Tuck. Life of Jefferson, 207; 1 Madison Papers, 431.—(s) Seybert Stat. Ann. 25, 27; 2 Malthus Pop. 525; Darby's View U. S. 434.

of life interests in property ; yet, from the continual oscillations of our population, it must be exceedingly difficult to make any correct observations as to the average rate of mortality in any of our cities or counties, or even in any of the states of our Union. (*l*) The two strong ties, poverty and wealth, which prevent migrations, have been often broken by the oppressions of government in the old world ; but in our country the universal parental care of the government and the equal distribution of property, lifting all above want, and dispersing, at short intervals, the great accumulations of wealth, leave it in the power of all to remove at pleasure ; so that the peculiar temptations of advantage offered by the various regions of our country cause continual and most extraordinary shiftings of our population.

It is admitted as regards even the comparatively stationary circumstances of the cities of Europe, that a large allowance must be made for the adult population annually poured into them from the country. (*u*) But, as to the cities of this Union, the annual accession of some of them from the country has been so great as to confound all calculation. Philadelphia, perhaps, in this respect, the most stationary among them, far exceeds any one of Europe in its acquisitions from the country. (*w*) But the city of Baltimore, the great emporium of Maryland, which was but a poor village in 1776, at this time, (1831,) contains eighty thousand six hundred and twenty persons ; and may be regarded as almost an entirely new aggregation from abroad within the ordinary term of human life. It would therefore be impossible, as yet, to form any correct table of the expectation of life within the city of Baltimore. (*x*)

The shiftings of the population of the several counties of Maryland have also been in many respects very extraordinary, and altogether dissimilar from any thing observed of any district of the country population of Europe. It appears, that, as a whole, Maryland has continued greatly to increase in population from its first settlement down to the last census, (1830 ;) and yet, that most of the lower counties within which the main strength of the state was found, during the revolutionary war, have latterly diminished in their population by having large portions of it, with a considerable increase, after deducting the great mass thrown into the new regions of the west, shifted into the upper counties ; great spaces of which

(*l*) 1 Malthus Pop. 22.—(*u*) 1 Malthus Popu. 468.—(*w*) Seybert Stat. Ann. 48 — (*x*) Seybert Stat. Ann. 48 ; 2 Price Obser. Essay 2.

were, during the revolution, almost entirely uninhabited. (*y*) And it also appears, from the periodical enumerations made under the authority of the Union, that although there are, every where, a much greater number of males than females born; yet the diminution of the males as they reach maturity, within many of the counties of this state, the salubrity of which has not been at all changed, is much more rapid than elsewhere, owing to the great emigration from them to the west. From a comparative view of the census of the several states of the Union, it will be seen, that in the elder and most densely peopled of them, the males are most numerous; while in those from which there has been the greatest emigration, and in the newest and frontier states there are not, in many instances, so many as ninety females to every hundred males. (*z*) Whence it appears, that now, as in the original peopling of Virginia by the English, the first plantings every where in this country, by enticing away the males, or bringing together a much larger proportion of adult males than females, has, by thus separating the sexes, so far operated as a check, instead of an encouragement, to the natural increase of population. (*a*)

The making of all observations as to the expectation of human life here are, however, not only rendered difficult by the extraordinary shifting of our population; but those difficulties are much increased by the changes continually going on in the salubrity of many situations in our country. The territory of Maryland, when the first settlers seated themselves upon it, was every where covered by a thick and lofty forest, and drained by innumerable rivulets, creeks and rivers all pouring into the great Chesapeake. A territory so shaded, and so netted with humid valleys and water-courses, many of them descending from rugged and elevated mountains, under a climate, ranging from such high degrees of heat in summer, to such low degrees of cold in winter, it is evident, must have been, in its primitive state, productive of causes affecting human life differing materially in malignity from those which had been found to arise over any equal space of Europe. But the active civilized people who took possession of Maryland as they increased in numbers and advanced, felled large spaces of the forest and laid bare, drained, and cultivated the soil. These operations by changing the state of things, may have produced some

(*y*) Seybert Stat. Ann. 37.—(*z*) Seybert Stat. Ann. 40, 42, 45.—(*a*) 1 Burk's His. Virg. 206; 1 Malthus Popu. 6; 2 Malthus Popu. 54.

changes in the climate; and have, no doubt, been attended by some ameliorations in the salubrity of the country which, it is more than probable, will continue to go on until our population becomes as dense as that of the best portions of Europe. (b)

The African race, in our country, are, in many respects, materially different from the European. The negro constitution has in it something peculiarly calculated to resist that malaria which is so deadly to the whites. A negro, it is well known, will enjoy good health during some seasons and in many situations in which the white man can scarcely exist. In all that concerns the probable or average duration of human life, as being in any way involved in a judicial determination upon a right of property, it would seem to be wholly unnecessary to extend our inquiries beyond the class of free whites; because free negroes have little property, and negroes held as slaves can have none. But although slaves are incompetent themselves to hold property; yet considered as property they have always been valued, assessed, and taxed in proportion to their ability of body, age, and sex; (c) and there is no legal reason why an estate may not be held during the life of a negro slave. (d) It is by no means uncommon for negroes to have legacies given to them for their support by way of an annuity for life, or to have small pieces of land given to them for life. Where slaves are given by a parent to his child as an advancement, if, after the death of the parent, the child brings such advancement into hotchpot, in order to be let in as a distributee, the advancement, here as in England, must be valued as of the day when it was made; and, consequently, slaves so given, must be valued as of that day, exclusive of their subsequent increase. (e) And so too in all other cases where slaves are to be valued it must be with reference to their peculiar expectation of life as well as to their bodily ability, skill and other qualities. (f)

It is certain, that life interests in almost every form, such as estates for life in lands, in personal property, in annuities, &c. were fully recognized by the law of England from a very remote period; yet the doctrine of chances, in relation to the expectation

(b) Darby's View U. S. 421, 427; Hume's Essays: Of the Populousness of Ancient Nations; Taylor's Arator, Number 51, Draining.—(c) October, 1777, ch. 14, s. 4; October, 1778, ch. 7, s. 11.—(d) *Biscoe v. Biscoe*, 6 G. & J. 239; *Hall v. Mullin*, 5 H. & J. 190; *Cunningham v. Cunningham*, Cas. Confr. North Carol. 353.—(e) *King v. Worsely*, 2 Hayw. 366; *Warfield v. Warfield*, 5 H. & J. 459.—(f) 2 Southern Revi. 177, note; 1 Hume's Essays, 225, note M.

of human life, as a means of ascertaining the present value of such interests, is of comparatively modern date in England; and does not appear to have been, in any way, noticed in our law until after our Declaration of Independence. In several of the original states of our Union companies have been incorporated, with power to grant life annuities, and to make assurances of lives; (g) which, on the part of such bodies politic particularly, must necessarily involve a careful consideration of what may be deemed the expectation of human life at the various ages. And there have been other legislative enactments which appear to have involved a similar reference to the doctrine of chances, in regard to the expectation of life, as a means of making a just apportionment of taxes between estates for life and those in remainder or reversion in lands. But little is to be found in the judicial proceedings of our country in relation to this matter.

It appears, that in New York, in cases in equity, where it becomes necessary, or it is agreed to award to a widow a compensation in lieu of her dower, it is the course of the court to refer the matter to a master in Chancery to have a gross sum liquidated by the value of her life according to the tables of life annuities; or to have the interest of one-third of the purchase money of the estate secured to her for her life; and yet it would seem, that the gross sum to be awarded to her must be no more than equivalent to the price of an annuity the same in amount as the annual rents and profits of her dower. (h) In Virginia it is said, that where the estate is sold, and the widow agrees to receive a gross sum in lieu of her dower, the court must direct an issue to have the amount ascertained; (i) which, however, is only calling upon a jury to cut the knot, since they could not be more capable than the Chancellor of drawing from the evidence any settled precise idea of the value. (j) But if the widow refuses to accept a gross sum in lieu of her dower, then, it is said, that one-third of the purchase money must be set apart, and the interest thereof be paid to her annually during her life. (k) And in South Carolina, where in equity an estate is sold, it is laid down, that a reasonable compensation must be

(g) 1807, ch. 68; 1813, ch. 101; 1827, ch. 189.—(h) *Tabele v. Tabele*, 1 John. C. C. 45; *Hazen v. Thurber*, 4 John. C. C. 604; *Titus v. Neilson*, 5 John. C. C. 458; *Swaine v. Perine*, 5 John. C. C. 491; *Everston v. Tappan*, 5 John. C. C. 513; *Hale v. James*, 6 John. C. C. 263.—(i) *Pollard v. Underwood*, 4 Hen. & Mun. 459; *Davison v. Waite*, 2 Mun. 527.—(j) *Griffith v. Spratley*, 1 Cox, 390.—(k) *Herbert v. Wren*, 7 Cran. 330.

allowed to the widow for her dower, without referring to any principles by which the amount of such compensation is to be ascertained by the master in Chancery by whom it is to be adjusted. (1)

In Maryland there have been frequent and important occasions for recurring to the doctrine of chances in regard to the expectation of human life as a means of ascertaining the value of life interests in property; and the valuation of such interests has presented many and great difficulties to the minds of the legislative as well as to those of the judicial department; and therefore, it cannot be deemed amiss to bring together here all that is to be found in the books of our code in relation to this important matter.

An annual public tax upon land may, with propriety, be regarded, in most respects, as being of the same nature as a mere incumbrance imposed upon it by its individual owner. It is evidently one that bears upon it like the annual interest of a mortgage debt; which must be kept down by the particular tenant who takes its rents and profits. But although that may be considered as a correct mode of adjusting such a burthen as between a particular tenant, paying no rent, and a mere naked reversioner or remainderman; yet as between landlord and a tenant rendering rent; and as between a tenant of a house rendering rent to a landlord, who himself pays rent over to a ground landlord for the same estate, the question is different; and the mode of adjusting the burthen of taxation, in such cases, is by no means so clear. The proportions and the mode in which a tax should be borne by those who hold distinct interests in the same land seems to have been attended with some perplexity every where; and it appears, that the matter remained long in doubt here, even if it can yet be considered as having been finally put to rest.

It has been laid down as a settled principle, that the citizens of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. The expense of government to the individuals of a nation is like the expense of management to the joint-tenants of a great estate, who are all obliged to contribute in proportion to their respective interests. In the observation or neglect of this maxim consists what is called the

(1) *Miller v. Cape*, 1 Desau. 110; *Miller v. Miller*, 1 Desau. 111; *Clifford v. Clifford*, 1 Desau. 115; *Rutledge v. Williamson*, 1 Desau. 159.

equality or inequality of taxation. (*m*) All taxes ought to fall as equally as possible upon the fund which must finally pay them. The rent of houses, though it, in some respects, resembles the rent of land is, in one point, essentially different. The rent of land is paid for the use of a productive subject. The land which pays it produces it. The rent of houses is paid for the use of an unproductive subject. Consequently, a tax upon the rent of land falls ultimately upon agriculture, whereas a tax upon the rent of houses is paid finally from a revenue derived from the wages of labour, the profits of stock, &c. No tax should, if practicable, be allowed so to operate as to take away any part of the capital value of property; because it thereby tends to diminish the funds destined for the maintenance of productive labour. (*n*)

These general principles have been incorporated into our Declaration of Rights, which declares, 'that the levying taxes by the poll is grievous and oppressive, and ought to be abolished; that paupers ought not to be assessed for the support of government; but every person in the state ought to contribute his proportion of public taxes for the support of government, according to his actual worth in real or personal property within the state; yet fines, duties, or taxes may properly and justly be imposed, or laid with a political view, for the good government and benefit of the community.' (*o*) The restrictions and regulations as to the taxing power of the General Assembly contained in this article are of great importance; and therefore a few remarks as to their nature; and a cursory view of the manner in which they have been observed and applied, may throw much light upon the matter now under consideration.

A poll tax upon slaves is altogether different from a poll tax upon freemen. The latter is paid by the persons upon whom it is imposed; the former by a different set of persons. The latter is either altogether arbitrary, or altogether unequal, and in most cases is both the one and the other; the former, though in some respect unequal, different slaves being of different values, is in no respect arbitrary. Every master who knows the number of his own slaves, knows exactly what he has to pay. Those different taxes however, being called by the same name, have been often considered

(*m*) Smith's Weal. Nations, b. 5, c. 2, pt. 2; Vattel, b. 1, c. 20, s. 240.—

(*n*) Smith's Weal. Nations, b. 5, c. 2, pt. 2.—(*o*) Decla. Rights Mary. art. 13; 1650, ch. 26, s. 3; Articles Confed. art. 8; 1 Madison's Papers, 250, 260, 502, 503, 506.

as of the same nature. A tax of so much a head upon every slave is properly a tax upon the profits of a certain species of stock employed in agriculture; and as the greater part of the slave owners in Maryland are both cultivators and owners of land, the final payment of such a tax would fall upon them in their quality of land owners without any retribution. (*p*) A poll tax of forty pounds of tobacco on persons, called the assessment of *forty per poll*, was laid here under the provincial government, for the support of the clergy of the then established church, upon all male residents, and upon all female slaves, and free female negroes and mulattoes above sixteen years of age, except slaves adjudged by the county court to be past labour. (*q*) And besides this tax of *forty per poll*, there was also a poll tax imposed upon all the same description of inhabitants; (*r*) and at times upon *bachelors*, (*s*) to raise a revenue for the state. It is sufficiently evident however, that all kinds of poll taxes upon free persons must be considered as having been denounced and totally abolished by this article. (*t*)

Under the provincial government, poor people who received alms from the county, were exempted from taxation. (*u*) Such a class of persons, it is evident, must necessarily be deemed *paupers* within the meaning of the second clause of this article. In other respects, however, it seems that the term *pauper* was not found to be altogether free from ambiguity; and therefore, the Legislature enacted, that all those whose property should not be valued above *ten pounds*, afterwards, *forty dollars*, should be declared *paupers*, and not charged with any tax. (*w*) But where the tax has been confined to county and special purposes, this pauper exemption, without apparently doing violence to the constitutional rule of equality, has been extended, in some counties, to those whose property was not assessed to *one hundred dollars*, or to *three hundred dollars*. (*x*) The first General Assembly of the Republic laid a tax upon every person having any office of profit of five shillings in the hundred pounds of the annual profits of such office; and also a tax upon every person practicing law, or physic, and upon

(*p*) Smith's Weal. Nations, b. 5, c. 2, pt. 2.—(*q*) 1702, ch. 1, s. 3; 1715, ch. 15, s. 5; 1725, ch. 4; 1763, ch. 18, s. 23 and 81.—(*r*) 1704, ch. 34; 1715, ch. 15, s. 5; 1754, ch. 9; 2 Bozman's His. Maryl. 204.—(*s*) 1756, ch. 5; 2 W. & M. c. 6, s. 11.—(*t*) 1 Hume's Essays, Exper. 8 of Taxes; 1 Madison's Papers, 509.—(*u*) 1715, ch. 15, s. 5.—(*w*) November, 1781, ch. 4, s. 68; November, 1782, ch. 6, s. 49; November, 1783, ch. 17, s. 36; 1784, ch. 56, s. 40; 1785, ch. 83, s. 17; 1792, ch. 71, s. 25; 1803, ch. 92, s. 18; 1812, ch. 191, s. 16; 1829, ch. 106, s. 6.—(*x*) 1817, ch. 41 and 49.

every hired clerk and factor of five shillings for every hundred pounds of the yearly profit of such practice, wages, or factorage. (y) A tax was also imposed upon all free able-bodied unmarried adult males, under fifty years of age; (z) and similar taxes were imposed upon other descriptions of persons. (a)

In what light are such taxes to be regarded? Are they to be considered as poll, or capitation taxes, or taxes upon property, or upon wages or profits? or can they be considered as falling within any of the restrictions of this article? The persons on whom these taxes were imposed, certainly could not be deemed *paupers*; yet the law itself, directing the assessment, impliedly admits, that it was not a contribution of their proportion of public taxes according to their actual worth in *property*; nor is it intimated, in any of the acts by which they were imposed, that those taxes were imposed with a political view for the benefit of the community.

It appears, then, from this article of the Declaration of Rights, that it must be regarded as a constitutional duty of the General Assembly so to lay all taxes as that they shall bear upon each person in exact proportion to his actual worth in real or personal property; but it is presumed, that this rule extends only to such taxes as may be laid to raise a revenue to the state, not to assessments for mere county or local purposes. A land tax assessed according to a general valuation, however equal it may be at first, must soon become unequal; and as to prevent its becoming so would require the constant and painful attention of the government to all the variations in the condition of every different farm in the country; (b) this constitutional rule cannot be so interpreted as to require that the contribution of each citizen should be in exact mathematical proportion to his actual worth in property; because to keep all taxes so continually and exactly proportioned, would be impossible; and therefore it can only be necessary that an assessment should be made from time to time according to as close an approximation to an exact proportion as, under all circumstances, is entirely practicable. (c)

This general rule, if it had been suffered to stand unqualified,

(y) February, 1777, ch. 22, s. 5 and 6.—(z) October, 1778, ch. 7, s. 48; November, 1779, ch. 35, s. 57; October, 1780, ch. 25, s. 62; November, 1781, ch. 4, s. 66; November, 1782, ch. 6, s. 47; November, 1783, ch. 17, s. 35; 1784, ch. 56, s. 38; 1785, ch. 83, s. 16.—(a) 1790, ch. 33; *Egan v. Charles County Court*, 3 H. & McH. 169.—(b) *Smith's Weal. Nations*, b. 5, c. 2, pt. 2; *Gibbon's Decl. and Fall Rom. Emp.* ch. 17.—(c) 1785, ch. 33, s. 1.

would certainly have restrained the General Assembly from departing from any *practicable* degree of equality of taxation for any purpose whatever; but there has been engrafted upon it an excepting clause, which declares, that 'fines, duties, or taxes, may properly and justly be imposed or laid with a political view for the good government and benefit of the community.' No exception can be allowed to have the same extent as the rule itself. Exceptions merely qualify the rule in some of its operations, or take from under it some specified cases. This exception does nothing more than limit the operation of the general restriction upon the right to *impose* taxes; it allows of a departure from the rule no otherwise than in the imposition of taxes. Fines, duties, and taxes, may be laid, it is said, with a political view for the benefit of the community. A citizen may have a fine imposed upon him as a punishment for his misdemeanor or crime; a duty may be imposed as a means of insuring good conduct, and in aid of the police, as in the form of a duty for a license to keep a tavern, to retail spirituous liquors, to keep a billiard table, &c.; a treble tax may be imposed with a political view, as upon non-jurors during a war, &c.; (d) and to prevent altercation about what should be deemed a money bill, it is declared by the Constitution, 'that no bill imposing duties or customs for the mere regulation of commerce, or inflicting fines for the reformation of morals, or to enforce the execution of the laws, by which an incidental revenue may arise, shall be accounted a money bill.' (e)

But all these expressions relate to the *imposition* of taxes, not to an *exemption* from taxation. There is nothing in these clauses, nor any thing in the whole of either article which authorizes the General Assembly to exempt any private property from taxation, or to exonerate any person, natural or artificial, from contributing his or its proportion of the public taxes according to his or its actual worth in property; nor is there any thing in any part of the Declaration of Rights, or in the Constitution and Form of Government of the state which admits of such an exemption in any manner or form whatever.

The English statute, passed in the year 1692, for the laying of a general tax, embraced all property of every description, real and personal, ready money and debts, as well as the shares of the New

(d) March, 1778, ch. 15; June, 1778, ch. 9.—(e) Const. art. 11; 3 Hatsell's Precedents, 104.

River water-works, and the shares of stock held by individuals in other companies. The assessment upon land was made, not upon its capital value, but at the rate of four shillings in the pound of its annual rent; and that which did not rent for twenty shillings a year, was exempted from taxation. (*f*) But whatever may be within the uncontrolled power of parliament in this respect, it is laid down, that where any such equal contribution has been required, the *king* cannot, by any exercise of his limited sovereignty, grant an *exemption* to any one; because it would increase the charge upon all the lands of those who were not exempted; for the king has not the power to lessen a tax imposed upon one man and charge it upon another. (*g*) The *non obstante* power of the crown in this, and in all other respects, having been totally abolished. (*h*)

Here, however, it has been at different times declared, not merely that all public property belonging to the United States, to this state, to a county, to colleges and county schools, houses of worship, and burying grounds, should be exempted from taxation; but that the property of foreigners coming here to settle should, for a time, be exempted; that the crop and produce of the land, in the hands of the person whose land produced the same; plantation utensils; the working tools of mechanics and manufacturers actually and constantly employed in their respective occupations; goods, wares and merchandise imported; all home manufactures in the hands of the manufacturers; all stills; ready money, grain, tobacco, riding carriages, and all licensed vessels whatever, should be exempted from taxation. (*i*) And a similar exemption from taxation has been extended to, and attempted to be made perpetual in favour of lands held by an ecclesiastical body politic; (*j*) and of the property of some incorporated joint stock companies. (*k*)

Are not exemptions from taxation, like these, of private property, violations of the constitutional rule directing that each person shall be made to contribute his proportion of public taxes

(*f*) 4 W. & M. c. 1; Gilbert's Court of Exchequer, ch. 14; Brewster v. Kitchin, 1 Ld. Raym. 318; S. C. 2 Salk. 615; Whitfield v. Brandwood, 3 Com. Law Rep. 421.—(*g*) Sloane v. Pawlett, 8 Mod. 18.—(*h*) 1 W. & M. sess. 2, c. 2.—(*i*) July, 1779, ch. 6, s. 6 and 8; 1780, ch. 25, s. 2; 1792, ch. 71, s. 1; 1797, ch. 89, s. 1; 1803, ch. 92, s. 1; 1812, ch. 191, s. 1.—(*j*) 1821, ch. 91.—(*k*) 1799, ch. 16, s. 11; May, 1788, ch. 7; 1824, ch. 79, s. 9; 1826, ch. 249; 1828, ch. 112 and 177; Gibbon's Decl. and Fall Rom. Emp. ch. 20.

according to his actual worth in property? Or can the granting of any such exemption be within the delegated and limited authority of the General Assembly of Maryland, any more than within the scope of the limited prerogative of a king of England?

In the Roman empire, under the reign of Augustus, a tax of five *per cent.* was imposed upon all legacies and inheritances of a certain value, which were not given to the nearest of kin on the father's side; so that, when the rights of nature and poverty were thus secured, it seemed reasonable that a stranger, or a distant relation, who acquired an unexpected accession of fortune, should cheerfully resign a twentieth part of it for the benefit of the state. (l) The British government has imposed a similar duty on legacies and shares of personal estate. The adjustment and imposition of which tax upon all subjects of testamentary donation, susceptible of being inspected, handled and valued, could give rise to no difficulty. But it is otherwise as to the valuation of a legacy given by way of annuity for life, which involves a consideration of the expectation of the life during which it is given. And therefore, as to such cases, the British statute has laid down certain rules by which the present value of such legacies given by way of life annuities might be calculated and ascertained, upon which present value the tax is to be imposed. (m)

This direction of the Declaration of Rights of Maryland, that every person ought to contribute his proportion of public taxes according to his actual worth in property, must be extended to all limited and life interests in property as well as to all absolute and unlimited estates; and therefore here, as under the British statute, to impose a tax in due proportion it becomes necessary, in like manner, to ascertain the present value of all life interests which may be made the subject of taxation. It would seem, that this rule has been taken from the most approved writers on political economy; according to whom, as we have seen, the contribution of each citizen should be in proportion to his abilities; that is, in proportion to the revenue which he enjoys under the protection of the state. If this be the true meaning of this constitutional rule, then he alone, who draws a revenue from his property, or has the present command of its profits, can be made to pay a tax upon it. A naked reversioner or remainderman cannot be taxed, as he not

(l) Gibbon's Decl. and Fall Rom. Emp. ch. 6.—(m) 36 Geo. 3, c. 52; 53 Geo. 3, c. 184; Matthews on Executors, 193, and App. B.; Ram. on Assets, 251.

only then draws no revenue from such property; but, from the nature of his estate, he may never have it in his power to derive any profit whatever from it. But if, on the other hand, by the expression, 'according to his actual worth in property,' it was intended, that the contribution should be according to the capital value of property of all descriptions, without regard to any present profit which its owner might derive from it; then it would seem, that as a naked unproductive reversion or remainder it must be regarded as property, as well as the highly profitable life estate upon which it depends, the owner of each interest must be made to contribute according to his actual worth in each of these kinds of property; and, that as the two estates together are no more than equal to a fee simple, so the tax upon each should be apportioned between the two, so as to be no more than equivalent to a tax upon the whole estate, if held altogether by one and the same owner.

The first General Assembly, convened under the constitution, in an act, the general frame of which seems to have been taken from the before mentioned English statute of 1692, declared, that a rate of two shillings in the pound should be set on all real and personal estate including ready money, tobacco in warehouses, and plate, according to the true value thereof; not, as by the English statute, according to the annual rent of the land. Yet it was provided, that if any person should be compelled by the enemy to leave his habitation, or be rendered incapable of carrying on his business he might be exempted from taxation. And it was also declared, that where land stood charged with the payment of rent, the lessee might pay the tax, and have it deducted from his rent. Thus charging him who occupied without rent, or the landlord who received the rent with the whole tax. (n) According to this mode of making the assessment, therefore, it would seem, that the first General Assembly had adopted that interpretation of this constitutional rule which looked to a contribution from each person in proportion to his revenue as being the true understanding of what was meant by his actual worth in property, without including any mere abstract right of property, such as land which had been laid waste, or was then occupied by the public enemy, or a naked reversionary interest unattended by any present profit. But, however, that may have been, this mode of making the assessment was soon put aside.

(n) February, 1777, ch. 21 and 22; June, 1777, ch. 14; October, 1777, ch. 14.

The laws for laying taxes passed by the succeeding General Assembly declared, that land under lease should be assessed to the lessor, proper allowance being made for leases for life, or lives, or for term of years outstanding. (*o*) In addition to which it was the next year declared, that the interest of tenant for life, or lives, or of lessees for term of years should be assessed according to their respective interests, due regard being had to all circumstances, and the value of the land; and that upon the same scale of proportion a distinct assessment should be made of the estate of tenant in dower, or by jointure on marriage, or by devise for life, or during widowhood, and of the reversion or remainder. (*p*) In the year following, it was declared, that where divers persons had particular estates in the same land, every such person should be assessed in proportion to his particular interest, so that the whole together should amount to the value of the land; but where a full rent was reserved, so that the interest of the tenant could not be considered as valuable, the whole tax should be assessed upon the landlord. (*q*)

It was the year after declared, that the interest of tenant by the courtesy, or tenant for life without impeachment of waste, who paid no rent, should be charged with the whole tax. (*r*) Again it was enacted, that a tenant by the courtesy, a tenant in dower, and a tenant for life, without any contingency and impeachment of waste, who paid no rent, should be charged with the whole tax; but that where divers persons had particular estates carved out of the same inheritance, as for years with reversion or remainder for life or in fee, a just computation thereof should be made in proportion to the value of their particular interests, so that together they should amount to the full value of the land; in which computation the length of the term for years, the age and health of the tenant for life, and the chance of the reversion should be considered. And it was further enacted, in the same law, that the lessors of ground rent, in Annapolis and other towns, to the amount of six pounds, should be assessed as for one hundred pounds capital, and so in proportion; and the lessees should be assessed on the actual worth of the improvements made since the lease, and the present value of the land, after deducting therefrom the value thereof, at the time of the lease, which value should be estimated at one hundred pounds for every six pounds of the ground rent, and so in proportion. (*s*) This last

(*o*) March, 1778, ch. 7, s. 23; October, 1778, ch. 7, s. 27.—(*p*) November, 1779, ch. 35, s. 30 and 32.—(*q*) October, 1780, ch. 25, s. 25.—(*r*) November, 1781, ch. 4, s. 27.—(*s*) November, 1782, ch. 6, s. 24; *Brockman v. Honywood*, 1 P. Will. 328.

mode of apportionment was entirely reapplied in the next year ; (*t*) and also in the year following, with the exception of the provision in relation to ground rents in towns, which was omitted. (*u*)

In the year following the General Assembly applied different rules of apportionment by a law which declared, that where divers persons have particular estates carved out of the same inheritance, as in dower, or by the courtesy, or for life or years, with reversions or remainders for life, in tail, or fee simple, a just computation thereof should be made in proportion to the value of their particular interests, so that they amount to the full value of the land ; and in making such computation the tenancy in dower, by the courtesy, or for life in possession, or estate for fifteen years without any valuable rent reserved should generally be considered as worth half the value of the fee simple ; but this general rule might be departed from as justice might require, considering the age and health of the tenant in dower, by the courtesy, or for life, and the chance of the remainder or reversion, or the length of the term for years and the value of the rent reserved ; but where a full rent was reserved, so that the interest of the tenant could not be considered as valuable, the landlord should pay the whole tax. And further, that ground rents in Annapolis and other towns, of eight pounds, should be assessed as for one hundred pounds capital ; and so in proportion : that the lessee should be assessed on the actual worth of the improvements made since the lease, and the present value of the land, after deducting the value thereof, at the time of the lease, which should be estimated at one hundred pounds for every eight pounds, of the ground rent reserved ; and so in proportion. And moreover, that the lessors of houses in Annapolis, and other towns, yielding an annual rent, should be assessed for every sixteen pounds rent, as for one hundred pounds capital, and so in proportion ; and upon leases for above three years, and where the value of the ground and improvements exceed the value of the rent, the lessee should be assessed upon the sum which the actual worth of the ground and improvements in ready money exceeded the value of the rent, calculating sixteen pounds at one hundred pounds capital. (*w*)

This mode of apportioning the burthen of taxation was continued for twelve years, when all the provisions respecting ground rents, and houses in towns, were entirely put aside ; and new rules were enacted by a law which declared that where divers per-

(*t*) 1783, ch. 17, s. 18.—(*u*) 1784, ch. 56, s. 18.—(*w*) 1785, ch. 53, s. 7 and 8.

sons had particular estates carved out of the same inheritance, as in dower, or by the courtesy, or for life, or for any term of years exceeding five years, with reversions or remainders for life, in tail, or in fee simple, a just computation thereof should be made in proportion to the value of their respective interests, so that together they should amount to the full value of the land. And in making the computation, the tenancy in dower, by the courtesy, or for life in possession, or estate for fifteen years, without any valuable rent reserved, should generally be considered as worth half the value of the fee simple; but that this rule might be varied from as justice should require, considering the age and health of the tenant in dower, by the courtesy, or for life, and the chance of the remainder, or reversion, or the length of the term for years. (x) But it was the next year declared, that the estates of tenant in dower, by the courtesy, or for life, should be assessed as estates in fee simple, and the reversion or remainder be exonerated. (y) This continued to be the law for several years, when it was modified by an act declaring that land held by tenants in fee simple absolute, or fee simple conditional or executory, fee tail, in dower, by the courtesy, for life, or for years, without any valuable rent reserved, should be wholly valued to such tenants; but that if the tenant should pay the public the sum valued for the estate of any landlord, he might have his action against the lessor for the sum so paid, or deduct it out of the rent reserved, unless otherwise agreed between lessor and lessee; and such is the law at the present time. (z)

It seems, then, that after many changes in the mode of making an assessment of public taxes, it has been latterly considered that, in general, the true understanding of the constitutional rule, which requires the contribution from each person to be in proportion to his actual worth in property, is, that the proportion must be according to his actual worth in such property as he has it in his power to make annually profitable; not in unproductive abstract naked rights of property, which may never be beneficial to him; and the title to which he cannot be compelled to litigate. (a) The

(x) 1797, ch. 89, s. 41.—(y) 1798, ch. 96.—(z) 1803, ch. 92, s. 40 and 41; 1812, ch. 191, s. 35 and 36; 2 Eq. Ca. Abr. 62, 64; *East v. Thornbury*, 3 P. Will. 128; *Nicholls v. Leeson*, 3 Atk. 574; *Gwynne v. Heaton*, 1 Bro. C. C. 4, note; *Sutton v. Chaplin*, 10 Ves. 66; *Adair v. The New River Company*, 11 Ves. 429; *Brewster v. Kitchin*, 1 Ld. Raym. 318; *Hughes v. Young*, 5 G. & J. 68; *Ram. on Assets*, 134.—(a) *Devonsher v. Newenham*, 2 Scho. & Lef. 211.

annual public taxes seem to have been thus assimilated to the annual interest of mortgages, and other real incumbrances, which must be kept down by the tenant for life in possession, upon the principle that the annual profits should alone bear the burthen not only of the annual interest of all mortgage debts, but also of all other annual charges, as well public as private. And upon this principle, as it would seem, the collectors of the tax for some counties were authorized to sell timber suitable for cord-wood, or fence-rails, growing on land belonging to non-residents, to satisfy the taxes due thereon. (b) Hence as there is not, in such cases, any apportionment of the burthen of interest or taxes between the particular tenant and the remainderman or reversioner, the putting of a present value upon such estates is not called for, or ever made. But those legislative enactments which formerly, for the purposes of taxation, required a present value to be put upon estates for life, or during widowhood, and on terms for years, in such a variety of forms, and which must have been attended with much difficulty, to say nothing of the injustice of the operation of some of them, although now abrogated, are yet well worthy of attention in so far as they illustrate and afford evidence of the various bearings, and great importance of the matter now under consideration.

In England, as it would seem, few cases arise in which a widow may have a proportion, or the annual interest on a share of the purchase money of an estate awarded to her in lieu of her dower; and therefore, there is little or nothing to be found in the English books as to what should be considered as an equivalent for such a life estate. (c) But here, where it so frequently becomes necessary, under the act to direct descents, to have lands, of which partition cannot be made without disadvantage, sold in order to effect a division of the proceeds of sale among the heirs; and also to make sale of the real estates of deceased persons for the payment of their debts, it often happens, that a widow may be called on to allow the estate to be sold free of her claim to dower, and to accept an equivalent portion of the purchase money in lieu of it.

In these and a variety of similar cases where relief has been sought by means of special legislative enactments, it appears that what should be deemed the present value of a life interest in land, has been in a great many instances submitted to the consideration

(b) 1826, ch. 170; 1827, ch. 110, 114.—(c) *Mole v. Smith*, 1 Jac. & Walk. 653.

of the General Assembly. In one of which the widow was to be allowed not more than a fifth nor less than an eighth; (*d*) and in another not more than a sixth nor less than an eighth of the net proceeds of sale; (*e*) in others she was to be allowed one-eighth, or not exceeding one-eighth; (*f*) in others not more than a seventh nor less than a tenth; (*g*) in others the proceeds of sale were directed to be invested; and the widow to be allowed one-third of the interest or dividends during her life; (*h*) in others she was to have awarded to her a proportion of the net proceeds of sale according to the rule of the Court of Chancery; (*i*) or the land was directed to be sold without affecting the widow's right of dower; (*j*) but in the greater number of cases the matter has been left entirely at the discretion of the court, to award to the widow such a proportion of the net proceeds of sale as might be deemed equal in value to her dower. (*k*) And in cases of tenants for life, the whole proceeds of sale have been directed to be invested, and the interest or the dividends of the whole investment awarded to the tenant for life during her life. (*l*) The General Assembly have not, however, in any of these private acts, referred to any rule by which the value of a life interest in lands was to be calculated, nor have they indicated the principles by which they had been governed in awarding to the owner what they so specified as an equivalent, or by which the courts of justice were to be regulated in estimating the present value of such interests when the matter was in part or altogether left to their discretion.

Besides these various private acts, in the passing of which this subject appears to have been placed before the mind of the Legislature, there are several public and important laws in relation to the valuing of life interests, in the passing of which by the General Assembly, it is but reasonable to presume, that the matter must have been more fully and deliberately considered.

In the beginning of the year 1800, the then existing law regulating the descents of real estates, was so modified as to declare, that in case of a sale of the real estate of an intestate for the purpose of effecting a division of its value among the heirs, there should be awarded to the widow, according to her age, health,

(*d*) 1801, ch. 82.—(*e*) 1815, ch. 45.—(*f*) 1811, ch. 137, 149; 1813, ch. 152, 161. (*g*) 1811, ch. 45; 1816, ch. 246.—(*h*) 1807, ch. 37, 135; 1809, ch. 49; 1810, ch. 138.—(*i*) 1812, ch. 160; 1814, ch. 90; 1816, ch. 224.—(*j*) 1819, ch. 129.—(*k*) 1802, ch. 67; 1803, ch. 91; 1810, ch. 25, 74; 1813, ch. 31, 93, 161, 175; 1819, ch. 102; 1825, ch. 64; 1827, ch. 102.—(*l*) 1808, ch. 15; 1816, ch. 50.

and condition, not more than a seventh nor less than a tenth of the net amount of sales in lieu of her dower; (m) which provision has been embodied in the now existing general act directing the course of descents of intestates' real estates. (n) The same range of allowance to the widow, according to her age, health, and condition, is declared to be the rule in cases, like the present, where lands are sold for the benefit of infants; (o) as well as in those cases where the court is authorized to sell the realty in order to save the personalty. (p) Dower is a life interest in one-third of a real estate; and, considered merely as such, it would seem necessarily to follow, that a similar rule and limited range of discretion might have been laid down for fixing the value of a life interest in the whole estate, as well as in the one-third of it only. But, in amending the act to direct descents, so as to provide for allowing an equivalent value to tenants by the courtesy, and to tenants for life, claiming by deed or devise, it was declared, that there should be awarded to such tenants for life such proportion of the purchase money as the court, upon consideration of the age, health, and condition of the tenant for life, should think just and equitable in lieu of such life estate; thus leaving the court's range of discretion entirely unlimited. (q) And these amendments have been engrafted into the existing general act to direct descents, without any material alteration. (r)

There is nothing in any of these laws, which shews, that in estimating the value of a life interest in land any separation or distinction was distinctly directed to be made between that portion of the purchase money of the whole which should be regarded as the price of the life interest only, and that which was to be considered as the price of the remainder or reversion. But such a distinction does not seem to have been altogether lost sight of in all the laws in relation to this matter; for it is declared, that upon a sale of a *reversion* belonging to an infant, with the assent of the tenant for life, the court shall order the annual interest, or *such part thereof* as may be deemed equitable to be paid over to such tenant for life during his life. (s) Whence it is clear, that the Legislature has not deemed it just in every instance to award to the tenant for life

(m) 1799, ch. 49, s. 6.—(n) 1820, ch. 191, s. 28.—(o) 1816, ch. 154, s. 10.—(p) 1818, ch. 193, s. 8; 1819, ch. 143.—(q) 1809, ch. 160, s. 4; 1810, ch. 25, s. 2; 1811, ch. 200, s. 2; 1812, ch. 181, s. 1.—(r) 1820, ch. 191, s. 35, 36, 37 and 38.—(s) 1816, ch. 154, s. 13, which act has been explained and extended to *remainders* by 1831, ch. 311, s. 9.

all the annual interest, as it may arise, from the whole purchase money, including that proportion of it which must be considered as the price of the reversion, as well as of that which may properly be regarded as the price of the life estate. Apart from these legislative enactments in relation to these specified estates for life in land; and as regards all other life interests in land, annuities for life, &c. the courts of justice have been left without any positive or general rule as their guide, to adjust the value of life interests, when called upon, as they could according to the general principles of law and justice.

There can be no doubt, that long antecedent to the amendment in 1800, of the act to direct descents, there must have been brought before the courts of justice many cases in which it was necessary to make a valuation of a life interest; but no such case has been reported. In a case which was brought before this court in the year 1801, by a widow to obtain an allowance of a proportion of the proceeds of sale as a compensation for her dower, the Chancellor speaks of it as the first of the kind, within his recollection. In adjusting the proportion of the proceeds of the sale to be allowed to her in that case, he declares, that as she could not use her third part of the land as tenant in fee simple, she could not be entitled to one-third of the annual interest on the whole purchase money; but on consideration of all the circumstances, and without apparently adverting to the act providing, that in cases arising under the act to direct descents, the widow should be allowed not more than a seventh nor less than a tenth of the proceeds of sale, he awarded to her three-twentieths of the net proceeds of sale. (t) Some time after which, this matter, as to the

(t) *Maccubbin v. Cromwell*, 2 H. & G. 457.

CASSANAVE v. BROOKE.—This petition, filed on the 29th of October, 1799, stated, that the petitioner was the widow of Peter Cassanave, who died seised of a large real estate in which she was entitled to dower; the whole of which, at the suit of the creditors of her husband had been sold for the payment of his debts; that the defendant Samuel Brooke, as trustee, had sold it, under a decree of this court, discharged of all claim of dower; and under that representation, it had been purchased by the then holders from the trustee. Therefore to quiet their titles; and that justice might be done to all, she prayed, that she might be allowed a proportion of the net proceeds of the sale in lieu of dower.

This petition was on the 29th of October, 1799, endorsed thus by the Chancellor. 'Issue *subpœna* returnable immediately.' After which the trustee answered on oath and admitted all the facts stated in the petition.

21st May, 1801.—*HANSON, Chancellor*.—The said cause being submitted on the bill or petition and answer, the same were by the Chancellor read and considered.

proper proportion of the proceeds of the sale of a real estate which should be awarded to a widow in lieu of her dower therein, seems

This is the first case ready for decree, that the Chancellor recollects in which it has been left to him to ascertain the proportion, which a widow is entitled to, on account of her dower, of the money arising from the sale of the whole interest in lands of which her husband died seised in fee having a legal title.

Inasmuch as she could not use her third part of the land as a tenant in fee simple might use it, it appears, that when the land is converted into money she cannot be entitled to the full present value of a third part of the annual interest of that money for life. The interest in the land which she parts with is such, that she cannot sell the timber off the land as a tenant in fee might do. The value then of the privilege of selling timber, &c. is to be taken into the account.

Upon the calculation which the Chancellor has made, on the principles adopted in Europe for ascertaining the present value of all interests in land, and on making a reasonable deduction on account of the aforesaid privileges, it appears to him, that the right of dower of a healthy woman, thirty years of age, as the present petitioner is stated and admitted to be, is about three-twentieths of the net sum for which the whole interest in the land has sold or shall sell for.

It is accordingly *Adjudged, Ordered and Decreed*, that the petitioner Ann Cassa-nave, is entitled to and shall receive three parts out of twenty of the net money, arising from the sale of those lands, under the decree of this court, of which her husband appears, from the petition and answer to have had a complete legal title; and it is further *Ordered*, that the auditor of this court state the sum she is entitled to from the said sales, deducting the costs of suit and the trustee's commissions.

The statement was made accordingly by the auditor, and the sum thus ascertained ordered to be paid.

GREENWOOD v. CLARKE.—This petition was filed on the 17th of January, 1801, to have a certain lot of land divided among the parties as the heirs of William Clarke, deceased. The defendants were all infants and non-residents. The petition stated, that the land would not admit of division and prayed a sale. Upon which an order of publication was passed to be inserted in the Baltimore Telegraph warning the defendants to appear, &c. The publication of which order was certified to have been made by the printer of that paper. On the 1st of July, 1801, it was decreed that the lands be sold, &c. Under which a sale was made, reported and absolutely confirmed, no cause having been shewn, &c. Upon which the Chancellor, by way of note said, 'it is suggested, that there is a relict of the deceased, married to another man, who has joined her in a power of attorney to authorize the sale of her interest, and the taking in lieu of her dower such sum as the Chancellor shall think proper, &c. But there is not the least proof of her being Clarke's widow, and entitled to dower. There is another defect of proof. It is material to know the widow's age, because allowances are made according to age. These defects may be supplied.' After which the proofs were exhibited and the case thereupon submitted.

17th November, 1804.—**HANSON, Chancellor.**—On the petition of Ann Randall with her husband James Randall, it is *Adjudged and Ordered*, that she, as relict of William Clarke, deceased, of Kent county, whose lands have been sold under a decree of this court, be allowed one-eighth part of the net money arising from the said sale as a compensation for relinquishing her right of dower. Let the auditor of the court state the application of the money, &c.

to have very strongly attracted the attention of *Chancellor HANSON*; and, as it would seem, without the slightest reference to any then existing act of Assembly, or to any previous decision of his own, he accordingly took up the subject on the 14th of September, 1803, with an avowed determination to establish a general rule by which the court should be governed in all future cases, when called upon to award to a widow an adequate compensation for her dower.

'Sometimes,' says he, 'when lands, subject to dower, are sold under the authority of this court, the widow and the persons concerned agree, that the Chancellor fix the value of the dower. There had prevailed an idea pretty generally, that the value of the dower, of a middle aged woman, was only one-eighth of the whole value of the land; and parties sometimes, in this court, have agreed, that one-eighth of the net money arising from the sale should belong to the widow. The aforesaid idea is evidently borrowed from England, where the widow's dower is estimated from the rents. For instance, land which would sell for £7,500, rents for only £300, or four *per cent.*; well; as the widow is entitled to one-third of the rent, *viz.* to £100 *per annum* for life, they calculate the present value of her annuity. If thirty years of age, or under, she has an equal chance of living twenty-four years; for this they set down twelve years certain, and then calculate the present value of an annuity of £100 for twelve years. This they find about £937 10s. 0d.; calculating their rate of interest which is five *per cent.*; the said £937 10s. 0d. is just one-eighth part of £7,500.'

'But surely the incontrovertible principle is this; as the widow is entitled to one-third of the land for life, when she consents, that the land may be sold, she is entitled to the interest of one-third of the money for life. Suppose then, the land sell for £3,000, the interest is £180, one third of which is £60; suppose her of such an age, that is, not exceeding thirty, as to have an equal chance of living twenty-four years; set down twelve years certain, and calculate the present value of an annuity for twelve years of £60 *per annum*. I calculate at compound interest of six *per cent.* and the said value to be rather more than £500, which is one-sixth of the whole money, £3,000. Had I calculated at simple interest the value would have been still less; but compound interest surely is right. You wish to know the present value of £100 to be received twelve years hence; you find it to be £50, because £50 at compound interest of six *per cent.* in twelve years amounts to £100, and

even a little more. Calculate at simple interest and the value of £100 receivable twelve years hence, is about £58 5s. 0d.; because £58 5s. 0d. at simple interest of six *per cent.* amounts, in twelve years, to about £100. Suppose a man accustomed to let money at interest, he can lawfully exact only six *per cent.* and must not charge interest on interest. Who is there, that can afford to let money at interest, and dispose of his surplus money in no other way, that would not be willing to receive twelve years hence the sum of £10,000 for £5,000 now lent? It is evident, that at simple interest, unless punctually paid and instantly let out, he cannot, in twelve years, convert his £5,000 into £10,000; at mere simple interest it amounts to only £8,600; because £300 is the interest of £5,000, and $£300 \times 12 = 3,600 + 5,000 = £8,600.$ '

'The Chancellor has taken the trouble to demonstrate clearly, that young widows have not generally received near the value of their dower. It is plain to common sense, that the dower of an old woman cannot be equal in value to that of a young one. To fix one value of all dowers is therefore, preposterous. The Chancellor has, with great trouble, care and attention, calculated, on the principles here laid down, the value of dowers of women of different ages. It is certain, that the value of the dower of a healthy woman twenty years of age, who has an equal chance of living thirty, is more than that of a woman, who has attained thirty years; however, the Chancellor, under all circumstances, has thought proper to consider the dower of all women, not exceeding thirty years of age, to be no more than one-eighth of the net sum produced by the sale of lands; and he thinks proper to pass a general order agreeably to which allowances for dower hereafter shall be made.'

'A healthy widow, not exceeding thirty years, shall be allowed one-sixth of the net amount of sales; if above thirty and not exceeding thirty-seven, one-seventh; above thirty-seven and not exceeding forty-five, one-eighth; above forty-five and not exceeding fifty, one-ninth; above fifty and not exceeding fifty-five, one-tenth; above fifty-five and not exceeding sixty, one-eleventh; above sixty and not exceeding sixty-five, one-twelfth; above sixty-five and not exceeding seventy, one-sixteenth; after that age all allowed one-twentieth.'

Some time after which, in the year 1804, the subject was again taken into consideration by *Chancellor HANSON*, when he thought proper to alter the graduation of the allowance to widows. 'From the table and calculations,' says he, 'taken from *Simpson's Algebra*,

of the probable duration of life, it appears, that the value of a woman's dower is as follows. If under thirty years of age, one-sixth; above thirty and under thirty-six, two-thirteenths; above thirty-five and under forty, one-seventh; above forty and under forty-five, two-fifteenths; above forty-six and under fifty-one, one-eighth; above fifty-one and under fifty-six, one-ninth; above fifty-five and under sixty-one, one-tenth; above sixty and under sixty-seven, one-twelfth; above sixty-six and under seventy-two, one-fourteenth; above seventy-two and under seventy-seven, one-eighteenth; and above seventy-seven, one-twentieth.'

On the 14th day of December, 1819, *Clement Dorsey* and *Samuel Chapman*, filed their bill in this court against *Charles S. Smith*, in which bill, among various other circumstances, it was stated, that *Henry A. Smith*, on the 17th of July, 1802, made his last will in which he said, 'I do hereby give and bequeath to my said wife *Dicandia S. Smith*, during her natural life, all the land whereon I now live, near and adjoining Benedict, Leonardtown, in Charles county.' And again, 'After the death of my beloved wife *Dicandia S. Smith*, I give to my brother *Charles S. Smith*, all my land where I now live adjoining Benedict, Leonardtown, in Charles county, to him and his heirs for ever. My will is, that in one year after my brother enters into the possession of the above land, he pay to my sisters *Margaret* and *Mary Wheatly*, or to their heirs, five hundred pounds current money (\$1,333 33 $\frac{1}{3}$) each, for the due performance of which I hereby make the said land liable.'

After which *Henry A. Smith* died leaving his widow, devisee, and legatees then alive, and his widow then and ever since a resident of Charles county. The plaintiff *Dorsey* married the widow *Dicandia*, and purchased of the defendant *Charles S. Smith*, the remainder so devised to him clear of all charge of the legacies for the payment of which it was so made liable. But the defendant having failed to satisfy those legacies, the plaintiff *Dorsey*, on the 17th February, 1817, bought one of them for the sum of \$1,101, and claimed a credit for that amount on the bond by which he and the plaintiff *Chapman*, were bound to the defendant for the purchase money of the estate in remainder.

On the 9th of December, 1823, the auditor made and filed a report in which he says. 'For the legacy bought by the complainant *Dorsey*, he has credited a sum, \$560 22, as with simple interest for twenty-three years, the probable duration of *Mrs. Dorsey's* life and one year after, would amount to £500; (1,333 33 $\frac{1}{3}$),

and then such a sum, \$349 06, also as, with compound interest, would amount to it. The calculation of the probable duration of *Mrs. Dorsey's* life is made from *Dr. Halley's* Table of Observations, which for a long time has been used as the foundation of such computations. The bill stated *Mrs. Dorsey's* age to be between forty-two or forty-three, or thereabouts. The answer admitted it. In February, 1817, when the complainant *Dorsey*, bought the legacy referred to, she must have been about forty. She then had an even chance of living twenty-two years, and the legacy was payable one year after her death.'

This is an instance of a reversionary payment; and, being a legacy charged upon real estate, would, according to the English law, and perhaps also according to our law, but for a single expression of the will, have lapsed for the benefit of the inheritance, if the legatee had died before the day of payment; and consequently, in that case, to ascertain its value on the 17th of February, 1817, it would have been not only necessary to deduct from it the value of the life of the person until whose death it was not to be paid, but also the value of the legatee's chance of living until the day of payment. (u) But the testator says my brother shall, 'pay to my sisters *Margaret* and *Mary Wheatly*, or to their heirs, five hundred pounds current money each;' from which expression, 'or to their heirs,' it may be presumed, that he intended these legacies should vest immediately; and consequently, they are not subject to the contingency of lapsing for the benefit of the inheritance, or of being wholly lost by the death of the legatee before the day of payment.

Here, however, was presented to the court a case for ascertaining the present value of a reversionary payment. In which case, as in all others relative to the value of a life interest, the important point, from which the inquiry must set out, is, that of the proper expectation of life of the person upon whose existence the interest depends, or after whose death the sum is to become payable; and, that being determined, every thing else must be the result of calculation.

It will be seen by adverting to the preceding tables, that the expectation of life from which, in this case, the auditor might have set out, ranges from nineteen to thirty-one years, according to the table from which *Mrs. Dorsey's* expectation of life was taken.

(u) 1 Price Obser. ch. 3; Will. Exrs. 781; 1810, ch. 34, s. 4; *Collet v. Wollaston*, 3 Bro. C. C. 228.

After having determined what number of years, according to those tables, or otherwise, should be allowed as the expectation of life during which the payment of the legacy was to be deferred, the rule, according to *Dr. Price*, is, for example, to subtract the value of the life from the perpetuity, absolute property, or fee simple estate. Multiply the remainder by the product of the given sum into the interest of one hundred pound for a year; and this last product divided by one hundred pound increased by its interest for a year, will give the answer in a single present payment. Recollecting, that in proportion as the expectation is short, as taken from the London table, or long, as taken from that of *Finlaison*, so will the life interest to be subtracted be large or small; and consequently, the present value of the reversionary payment be little or much. (*w*)

Upon this case two questions arose. *First*. Whether the plaintiff *Dorsey*, was to be credited for the whole amount he paid for the legacy? *Secondly*. If not with that amount, but with its true value on the 17th of February, 1817, when he bought it, then; How was that value to be ascertained?

March, 1824.—JOHNSON, Chancellor.—‘By the agreement the legacies are not to be satisfied by *Dorsey*. If, therefore, he has undertaken to satisfy them, or purchase them, as between him and *Smith*, he is only entitled to their worth at the time of purchase, and not to their worth when they take effect in possession. According to calculations by which the extent of a widow’s dower in land, when converted into money, and by which legacies to be paid after a life estate, are regulated, the legacy purchased by *Dorsey* was only worth \$560 22; indeed by the English rule, only \$349 06. But as that rule is founded on compound interest, on the principle that the interest should, as there it may, be immediately vested, although we adopt the time at which it is most probable the right to receive the legacy will arrive, yet its value is not come at by compound, but by simple interest; and by that rule *Dorsey* can only claim, in addition to the two payments, the sum of \$560 22.’ (*x*)

From this decision of the Chancellor the plaintiffs appealed, and the same questions were submitted to the tribunal of the last resort for determination.

June, 1826.—The Court of Appeals.—‘The consideration of the

(*w*) *Price Obser.* ch. 1.—(*x*) *Dorsey v. Smith*, 7 H. & J. 856.

sum which should be allowed *Dorsey* for the legacy purchased by him, involves a question which has not been adjudicated by this tribunal. Should he be allowed what he proves he has paid for it? We think not. By the contract he was not to pay the legacies; it was *Smith's* business to disencumber the land. And, if he is made to suffer by the purchase, he has no person to blame but himself. When *Smith* refused to exonerate the land in violation of his contract, he subjected himself to the legal consequences of such an act; but it would be a most inequitable consequence of such refusal to say, that *Dorsey* was thereby constituted his agent, with unrestricted powers to make the purchase; such a result would have placed him at *Dorsey's* mercy. But equity demands, that having purchased the legacy he should be entitled to a credit, as against *Smith*, for the legacy at its fair value, from the date of the purchase, 17th February, 1817.'

'By what rule is its value to be estimated? The Chancellor, in his decree, has adopted that value which was ascertained by the auditor by a reference to *Doctor Halley's* table of observations, which have been used in England for the purpose of ascertaining the value of life annuities, and reversionary interests. These tables are framed upon long and accurate observations on the bills of mortality in England, and in other places; and may not be an unsafe guide for the purpose in the region or latitude for which they were calculated. But the probability of the duration of human life, cannot be the same in every latitude and climate. In the one it may be prolonged to the greatest age, in the other abbreviated to what, in a more healthy region, would be considered as but a middle age; and even, indeed, in the same district of country the chance for the duration of life is by no means the same. Thus would tables, suited for the lowlands of Louisiana, furnish any index of the duration of human life in the highlands of Maryland? And, even in our own state, could any dependence be placed in the calculation of the value of an annuity, or of a reversion expectant upon a life, which would say, that as great a probability existed for the duration of human life amid the marshes of the Chesapeake Bay, as in the mountains of Allegany? These observations will be found to be verified by an examination of *Dr. Halley's* tables, as suited to different parts of England, and to places on the continent. Whether these tables, upon which the Chancellor's decree is founded, are suitable to this state, could only be told by a long series of observations here, which not

having been made, we conceive it would be unsafe to adopt them. In ascertaining the value of this legacy at the time of its purchase, we apprehend, there would be a much better chance of justice being effected by applying by analogy the rule adopted, long since, in the Court of Chancery, for the purpose of ascertaining the allowance to a woman, in lieu of her dower in land sold under a decree of that court. *Mrs. Dorsey* is shewn to have been about forty years of age at the date of the purchase, and the calculation should be made in conformity with the above rule. By such calculation the legacy was worth the sum of \$761 90. With this value the appellants should be credited on the day of the purchase of the legacy.' (y)

The manifest discordances of the rules which have been laid down, or adopted for the government of this court, in cases of this kind, require some further remarks. The legislative rule, in regard to dower, which directs that, in certain specified cases, not more than one-seventh nor less than a tenth of the net proceeds of the sale of the whole estate, shall be awarded to the widow in lieu of her dower, fixes an arbitrary limitation, the reason of which is not apparent. As early marriages in our country are common, there must be many instances of young widows; and consequently, this legislative rule must embrace all cases of widowhood from fifteen to eighty years of age; with an expectation of life, according to *Finlaison's* tables, ranging from forty-seven to no more than six years; and yet, bound by this rule, the court can, on the one hand, award to the life of forty-seven years expectation no more than a seventh; and on the other must give to the life of only six years expectation, not less than one-tenth of the whole net proceeds of sale. This rule thus appears from itself to be in many of its bearings unreasonable and unjust.

In all inquiries as to the present value of a life interest in real estate, it is indispensably necessary to bear in mind the distinction between the interest of the particular tenant, and that of him in remainder or reversion; and also to take especial care, that neither should have awarded to him any thing which may properly be considered a part of the value of the estate which belongs to the other. Thus, supposing the whole estate were sold for \$9,000; that sum would represent the entire value of the whole, including both interests, as well that of the tenant in dower, who was enti-

tled to no more than one-third for life, as that of him who was entitled to the fee simple of two-thirds, and of the reversion of the one-third; and consequently, if the widow were allowed \$3,000, she would have awarded to her, in that one-third, a sum of money which must be considered as including the full price of the reversion; to no part of which could she be entitled. It is clear, therefore, that she should not, in any case, be allowed as much as one-third of the purchase money of the whole estate. But, if one-third of the proceeds of sale were put out on interest, the interest which the whole third would so accumulate, would arise, not only from so much of it as represented the value of the widow's dower, but also from that which must be considered as the price of the reversion. Hence it would be as clearly wrong to give to a widow the whole of the interest arising from one-third of the proceeds of sale as to award to her the one-third of the principal itself. This reasoning, it is obvious, applies with no less force to the case of a tenant for life of the whole as to the case of a tenant in dower. It would be, in each case, directly, or in effect, to take away a part of the property of the reversioner or remainderman, and to give it to the particular tenant. But it may well be doubted, whether a court of justice has the constitutional power, in such a manner, to divest one person of his property, and transfer it to another. Yet, in making the calculation for the Chancery rule it was assumed, as we have seen, that the widow was entitled to the interest of one-third of the proceeds of sale for life. This, therefore, is the first element in which the Chancery rule is radically wrong.

It should also be recollected, in all cases of this kind, where it may be required, out of the purchase money or value of the whole, to separate the value of the particular estate from that of the inheritance, that it is necessary, in the first place, to attend to the true legal extent of the particular estate. Tenants in dower, by the courtesy, &c. are not allowed to commit waste; that is, they cannot cut and sell timber; open, and work unopened mines, &c.; and being restrained from deriving any such profits from the estate, the value of it, in regard to all such profits, properly forms a part of the price of the reversion or remainder; and the value of such profits also represents that which is the difference in price between a particular estate the tenant of which is, and one the tenant of which is not impeachable for waste. But this distinction does not appear to have been at all attended to in making the calculations

for the Chancery rule. This therefore is another element in which it must be considered as materially erroneous.

It appears, that the present value of a widow's dower was calculated for the Chancery rule at compound interest; because in England the present value of such estates, it is said, is calculated upon the ground of compound interest. But then it is laid down in an English adjudication, that as the computation of compound interest proceeds upon the idea, that the interest is paid upon the exact day and immediately laid out, which is impossible, it is sufficient to compute compound interest at four *per cent.* or at something less than the legal rate of interest. (z) The calculations for the Chancery rule have, however, been made upon the ground of compound interest at the full legal rate of *six per cent.*; which, if wrong in England, where there are so many ways of making immediate and safe investments of money, must be much more so here. This, therefore, is a third element in which that rule is substantially erroneous.

It has been shewn by reference to good authority, that the observations of the rate of mortality at Breslaw, from which *Dr. Halley* constructed his tables of the probability, and of the expectation of human life, have been found to be so entirely inaccurate, that they have never, in any case, been resorted to for many years past. And it has also, in like manner, been shewn, that the observations of the waste of life in London, from which *Mr. Simpson* formed his tables, were, in so many respects, erroneous, that they have been considered as very unsafe guides in calculating the value of human life even in London itself; and as totally unfit for use, in making an estimate of the value of life any where else. But it appears, that all the calculations for the Chancery rule were taken from the observations of London, and the tables of *Mr. Simpson* founded on those observations. This therefore is a fourth element in which that rule is essentially wrong.

It is well known, that in our country early marriages are common; and it appears from the observations of *Dr. Grenville*, that even in England, of eight hundred and seventy-six females, thirty of them had been married at or before fifteen years of age. Therefore as it may fairly be presumed, that there must be a great number of instances of widows under thirty years of age; and as according to *Painlaison's* tables, the expectation of female life, between

(z) *Nightingale v. Lawson*, 1 Bro. C. C. 443.

fifteen and eighty years of age, ranges from forty-seven to six years; any graduation of allowance in lieu of dower, to be correct, should, at the latest, commence with fifteen years and extend as far as eighty years of age. But the Chancery rule assumes, that all lives, under thirty, are of the same value; and, commencing with that age, has graduated the allowance from that period, at intervals of five years, no further than seventy-seven years of age. It is therefore, confessedly nothing more than an approximation to truth; and is in this respect materially defective.

In England, and indeed, as it would seem, all over Europe, for a great length of time past, the most usual, or perhaps the only method of coming at the fee simple value of land has been, first to ascertain the fair rental value or price, by the year; and to multiply that by the number of years purchase which the existing demand for land will bear in the given situation at the time. The ratio between the rental and the sale value of land, in England, varies from twenty to forty years; that is, a parcel of land the fair rental value of which is one hundred pounds, is worth, in common cases, from two thousand to four thousand pounds. In England a very large proportion of the lands are rented out by the fee simple owners; and therefore, it may not be difficult there, in this mode, to make an estimate of the fee simple value of any estate; either from the rent of itself; or, by analogy, from the rent of other similar estates in its immediate vicinity. But here, more than nine-tenths of the actual occupants and cultivators are also the owners of the fee simple; and, hence resort cannot be so readily had, here as in England, to the rental for the purpose of computing the fee simple value. But here, as in England, it appears, that so far as the rent or annual price can be ascertained, the ratio between the rental and the sale value ranges very wide; perhaps from fifteen to thirty-five years purchase.

In the case now under consideration, it appears, that the land actually sold for something more than twenty-six years purchase, and was valued, by the commissioners, at more than twenty-nine years purchase. This mode of estimating the value of property, by so many years purchase, has been applied not only to life estates and terms for years in land; but to annuities, terms for years, and life interests of all kinds. (a) In all cases there is a

(a) *Ree's Cyclo. v. Valuation of Lands*; 1 *Price Obser.* 38, 200; 2 *Spark's Franklin*, 326. 'Whatever a farm will sell for fixes its value as merchandise; but

material difference, in amount, between the annual legal interest of the purchase money of an estate, and its annual rents and profits. In a case, which not long since passed before this court, some lands in Prince George's county were estimated to be worth no more than four *per cent. per annum*, on the gross value, thus reckoning the fee simple value at about twenty-five years purchase. (b) In this instance, the annual legal interest, on the whole purchase money, would amount to \$2,235, when the net amount of the annual rent was no more than \$1,400. It seems to have been admitted in this case, that before the sale, the widow could be entitled to no more than one-third of the rent: and, accordingly, of the rent actually received, that proportion has been awarded to her by the auditor; but, after the sale, instead of \$466 66, as one-third of the whole rent, she is allowed to claim, at the rate of \$745; the one-third of the legal interest on the whole purchase money. There is an apparent inconsistency in this. And thus, in place of taking the rent or annual price as the basis of the computation, the legal interest of the purchase money has been assumed as the foundation upon which the calculations for the Chancery rule have been made. This therefore is a fifth element in which that rule is materially erroneous.

It has been stated, that where the value of the fee simple has been properly ascertained, that of any inferior holding may be readily found from it by means of the general rules of calculation. But if that were so, then there could be no difficulty, in any case, like this, where the value of the whole had been ascertained by an actual sale under a decree, to ascertain by calculation, when the case again came before the court for further directions, the value of any particular estate which had been carved out of it. But such a sale of the whole determines nothing as to the proportion between the particular estate and the reversion or remainder; and therefore that proportion is left to be ascertained just as if no such sale had been made. In such cases, the particular estate is, like the fee simple, to be valued by a computation of so many years

by no means is it a fair measure of its value as permanent farming capital. The true value of land, and also of any permanent improvements to land, I would estimate in the following manner: ascertain as nearly as possible the average clear and permanent incomes, and the land is worth as much money as would securely yield that amount of income in the form of interest, which may be considered as worth six per cent.'—*Ruffin on Calcareous Manures*, ch. 18.

(b) *Addison v. Bowie*, 2 Bland, 613.

purchase. A lease for a long term of years at a small rent may reduce the value of the remainder to very little; but a lease, at a nominal rent, for ninety-nine years renewable forever, would, in effect, annihilate the fee simple.

Estates for life have an absolute, but uncertain limit. To ascertain the duration of such estates recourse must be had to some table, shewing the expectation of life, to find what may be deemed the length of the life of the tenant for life. And then a calculation is made, from the rental value, of the sale value of the estate for life of such a duration. In England, as we have seen, it was formerly the rule to consider an estate for life as equal to one-third of the whole, and to charge it with a proportion of all incumbrances accordingly. But for some time past that rule has been abolished; and the best life is not now reckoned to be more than equal to one-third of the whole; and all such estates are estimated below that at their actual worth, upon a consideration of the age and health of the tenant for life, and of all other circumstances.

In some of our revenue laws, as has been shewn, a life estate and a term for years of not less than fifteen years duration was allowed to be computed as equal in value to one-half of the fee simple; but those laws have been disapproved of, and long since repealed. By the legislative rule, which allows to a widow, not more than a seventh nor less than a tenth, it appears, that by a seventh she will get nearly one-half of the net proceeds of the sale of that third of which she is entitled to dower. Thus, for example, in this case, the one-third of the net amount of the purchase money is \$12,418, and the widow has had awarded to her \$5,265; which is not very far short of one-half of the price of that portion of the land which was charged with her dower; and even if she had been eighty years of age the court could have awarded to her no less than a tenth, or \$3,725, which is not much below one-third of the price of so much of the estate as was charged with her dower. According to the Chancery rule, one-sixth of the whole, or \$6,209, would have been awarded to her as a widow of no more than thirty years of age, which would be exactly one-half of the purchase money of the land charged with her dower. And from the principles of the Chancery rule it necessarily follows, that a tenant for life of the whole of no more than thirty years of age is entitled to one-half of the whole net proceeds of sale.

After having thus traced this important subject through a long and devious course of judicial and legislative proceedings, it ap-

appears from all that has been said, that a great variety and repeated efforts have been made, as well by the Legislature as by the judiciary, to fix upon some general rule by which the present value of a life interest might be ascertained; and by which the proper proportions between such interests and the perpetual right, or estate of inheritance might be adjusted and determined. Much light has been thrown upon the subject, and some difficulties have been removed; but that rational degree of certainty, which is, in all respects, so desirable, has not yet been attained. The rules which have been laid down or adopted, in relation to this matter, are manifestly defective, erroneous, and unjust. They are so contradictory as to be utterly irreconcilable by any ingenuity or argument; and yet being rules laid down by the Legislature, or approved by the Court of Appeals this court cannot, as in some other cases, make an election to follow any one in preference to another of them; or adopt any new general rules applicable to the same and all other similar estates, which should more nearly coincide with reason and justice. (c) The subject can now only be extricated from the difficulties in which it has been involved by the Legislature.

The legislative rule, now in force in regard to dower, directs that where lands are sold for the benefit of infants, as in this instance; (d) or where the real estate is sold to save the personalty; (e) or where the real estate of an intestate is sold under the act to direct descents, (f) no more than a seventh nor less than a tenth of the net proceeds of the whole estate shall be awarded to the widow in lieu of her dower. But in regard to tenants by the courtesy and other tenants for life in real estate the matter has been expressly referred entirely to the discretion of the court to say what proportion of the whole net proceeds of sale should be awarded to them in lieu of their estates. (g)

As to all cases of dower, not embraced by the legislative rule, this court is governed by its own rule; which as it now stands, directs, that, 'the allowance to a healthy woman in lieu of her right of dower in land sold under decrees, to be as follows: If under thirty years of age, one-sixth; if above thirty and under thirty-six, two-thirteenths; if above thirty-five and under forty,

(c) *Higgs v. Warry*, 6 T. R. 655; *The Mayor of Southampton v. Graves*, 8 T. R. 592.—(d) 1816, ch. 154, s. 10.—(e) 1818, ch. 193, s. 8; 1819, ch. 143.—(f) 1820, 191, s. 28.—(g) 1816, ch. 154, s. 13; 1820, ch. 191, s. 35, 36, 37 and 38.

one-seventh; if above forty and under forty-five, two-fifteenths; if above forty-five and under fifty-one, one-eighth; if above fifty-one and under fifty-six, one-ninth; if above fifty-six and under sixty-one, one-tenth; if above sixty-one and under sixty-seven, one-twelfth; if above sixty-seven and under seventy-two, one-fifteenth; if above seventy-two and under seventy-seven, one-eighteenth; if above seventy-seven, one-twentieth of the net proceeds.'

There being no difference between a tenant in dower and any other tenant for life; except, that the one is entitled to no more than a third and the other is entitled to the whole for life; and there having been no distinction made in relation to this matter between particular tenants who are and those who are not punishable for waste. And the rule of this court, in relation to dower, being a much nearer approximation to truth and justice than that of the Legislature; and having been approved of by the Court of Appeals, and directed to be applied, by analogy, to ascertain the present value of a reversionary payment, it has been deemed proper to follow out its principles, and to consider it as a general rule in regard to estates for life in land, and life interests of all descriptions, other than dower, or those embraced by any legislative rule, of which this court may be called upon to ascertain the present value; that is to say,

The allowance to a healthy person in lieu of his or her life interest in the whole to be as follows; if under thirty years of age, one-half; if above thirty and under thirty-six, nineteen-fortieths; if above thirty-five and under forty, eleven-twenty-fifths; if above forty and under forty-five, two-fifths; if above forty-five and under fifty-one, three-eighths; if above fifty-one and under sixty-six, one-third; if above fifty-six and under sixty-one, three-tenths; if above sixty-one and under sixty-seven, one-fourth; if above sixty-seven and under seventy-two, one-fifth; if above seventy-two and under seventy-seven, one-sixth; if above seventy-seven, three-twentieths of the net proceeds.

In all cases where there is a widow, or particular tenant who wishes to obtain a proportion of the proceeds of sale in lieu of such life interest, it has hitherto been and must still be regarded as the practice, that before the case can be sent to the auditor to state an account distributing the proceeds, such particular tenant should bring the case before the court by petition, by motion, or by submitting it to the Chancellor, with an affidavit of some disinterested and credible witness stating the age, health, and condi-

tion of the widow or particular tenant; and if the widow should have married again it will be necessary that the testimony by affidavit should also identify, or shew her to be the same person under a different name, claiming with her then husband. (h) And as the valuation of the life interest is to be made as of the day of the sale by which it is extinguished, the age, &c. of the particular tenant should be shewn as of that day.

In this case the dower right to a part of the estate was extinguished by the sales made on the first day of May, 1829; and the order of the 17th of July, 1829, was made on the affidavit of the age, &c. of the widow as of that day of sale. But as the residue of the estate was not sold, and the dower right thereby extinguished until the 17th of December, 1830; the age of the widow had thus far advanced, and there might have been such a material change in her health, &c. as would have made a great difference in the amount to be awarded to her according to the Chancery rule; and therefore, there should have been, according to that rule, another affidavit as to her age, &c. But as this is a case governed by the limited legislative rule, and no objection is made, such further proof, as to her age, &c. as of the day of the last sale may be dispensed with.

Considering the life interest as having been sold and extinguished by the sale of the whole; when that sale has been finally ratified, the real estate is thereby converted, and the proceeds thereof vested absolutely in those then entitled to them; and consequently, if the particular tenant should die after that time, his or her share of the proceeds, according to age, &c., on the day of sale, will not, as the particular estate would have done, revert or sink, but go to the assignee or legal representatives of the deceased particular tenant. (i)

Whereupon it is *Ordered*, that the foregoing report of the auditor be, and the same is hereby ratified and confirmed; and the trustee is directed to apply the proceeds accordingly, with a due proportion of interest.

(h) *Greenwood v. Clarke*, ante 268.—(i) *Maccubbin v. Cromwell*, 2 H. & G. 448; *John Carr and others v. Richard Watkins and others*, 12 June, 1835.—M. S.

COOMBS v. JORDAN.

In a creditor's suit the purchaser may be directed to pay a creditor out of the unpaid purchase money.—The administrator of a deceased trustee ordered to bring into court the bonds given by the purchaser, with the purchase money which had been collected, and also to account.—The administrator and heir of a deceased purchaser ordered to pay the purchase money.—The estate ordered to be re-sold to pay the balance of the purchase money.

The origin and nature of a judicial lien which fastens upon all the real estate then held, or thereafter acquired by the defendant from the date of the judgment.—In the case of an obligee against the heir of the obligor, in respect of real assets descended, the lien attaches upon such assets from the day the suit was commenced.—Lands in Maryland were, in some cases, liable to be taken in execution and sold for debt before the year 1732.

The adoption of the British statute of 1732, making lands liable to be taken in execution and sold for debt; and its construction considered.—What is to be considered as real estate upon which a judicial lien will fasten.—To what kind of real estate, in reference to its tenure, a judicial lien will attach.—An equitable as well as a legal interest in land may be taken in execution and sold for debt.

A judicial lien on land is, here, a consequence of a decree in equity as well as of a judgment at law.—A judicial lien, when barred by lapse of time, cannot be revived so as to have a retrospective effect prejudicial to the rights of others.—Where a judgment has abated by death, during the continuance of the lien, the plaintiff, or his representative, may come in, under a creditor's suit, as a judgment creditor, without reviving at law.

A purchaser under a decree is not bound to see to the application of the purchase money.—The tacking of one claim to another is never allowed to the prejudice of others.

THIS was a bill filed on the 18th of July, 1809, by *Samuel Coombs*, in behalf of himself and the other creditors of *Richard Jordan*, deceased, against *Richard Jordan*, *Ann Jordan*, and *James Cook*. The bill states, that *Richard Jordan*, deceased, at the time of his death, was indebted to the plaintiff by judgment in the sum of £45 15s. 9½d.; and died intestate possessed of a large personal estate, and seised in fee simple of a large tract of land called *Brambly*, leaving the infant defendants *Richard* and *Ann*, his only children and heirs; that the defendant *Cook*, took out letters of administration upon the personal estate of the intestate, and paid to the plaintiff \$67, in part satisfaction of his claim, but declined paying any more; alleging, that there were other creditors of the intestate; and that there were not assets sufficient to pay the plaintiff a greater proportion of his claim. Whereupon it was prayed, that, in case the personal estate of the deceased should be insufficient, his real estate might be sold to pay his debts; and that the plaintiff might have such other and further relief as the nature of his case might require.

The infant defendants *Richard* and *Ann*, on the 10th of April, 1810, answering by their guardian *ad litem*, admitted the allegations and matters set forth in the bill of complaint. And the defendant *Cook*, by his answer, filed on the 28th of June, 1810, admitted the truth of the allegations of the bill, and that the personal estate of the deceased was insufficient to pay his debts.

30th June, 1810.—KILTY, Chancellor.—Decreed, that the property in the proceedings mentioned be sold, that *James Cook* be, and he is hereby appointed trustee for making the said sale, &c., the one-half of the purchase money to be paid in one year, and the residue in three equal annual payments, with interest from the day of sale, &c.

Under this decree, the trustee reported, that on the 24th day of September, 1810, he sold, subject to the dower of his widow, the real estate of the intestate to *Jeremiah Booth*, consisting of 397½ acres of land, at \$28 50 per acre; and an undivided half of a lot of land whereon a warehouse stood, for \$1,000; amounting altogether to £4,623 5s. 7½d.; which sale, after the usual order *nisi*, was, on the 17th of June, 1812, absolutely ratified and confirmed.

On the 30th of July, 1812, the auditor reported, that he had stated sixteen claims of creditors, including that of the plaintiff as No. 5, exhibited against the estate of the deceased *Richard Jordan*, amounting to £1,720 12s. 2½d., including interest thereon to the day of sale, to some of which he stated objections; and that after the payment of the trustee's commission and costs, and the full amount of the claims, there remained a surplus of £619 16s. 2½d. out of the money received by the trustee.

30th July, 1812.—KILTY, Chancellor.—Ordered, that the statement of the claims reported by the auditor, which are not objected to by him, be confirmed, and paid by the trustee with interest thereon, in proportion as the same has been or may be received; and that the commission be retained with interest in like manner; and the costs paid to the sheriff, register, and auditor. The claims No. 9, 14, 15, and the claim of *James Thompson*, to stand for further proof.

On the petition of *James Dall & Co.*, their claim No. 10, was restated by the auditor to rectify a mistake which had been made to their prejudice. And on the 12th of January, 1813, the trustee was directed to report what further proceeds of sale he had received; and to pay away no part thereof until further order.

After which *Edmund Key*, by his petition, stated, that he was the guardian of the infant defendants *Richard* and *Ann*; and therefore prayed, that the surplus of the proceeds of the sale of their ancestor's real estate, which had descended to them, and had been sold, might be ordered to be paid to him to be invested for their benefit, &c. A similar application was also made by a letter of the 20th of May, 1816, from the said *Key*, addressed to the Chancellor.

On the 11th of June, 1816, the auditor reported that he had restated the claims of the creditors, amounting to \$2,762 24, to pay which, the sum brought in by the trustee was not sufficient, by \$124 30; which report was, by an order of the same day, confirmed. And the auditor also reported, that he had stated two additional claims, that of *James Cook* as No. 22, and that of *Henry H. Chapman* as No. 23; which were afterwards allowed; so that it would in fact require the sum of \$377 21, to be brought in by the trustee to satisfy all the claims of creditors thus approved and passed.

After which the auditor was requested by the Chancellor to state the balance due to *Ann Jordan*; and whatever might be necessary to forward a settlement. In answer to which the auditor stated, that there was no paper from which he could ascertain how much was due from the trustee, or the purchaser; and therefore he could not say how much was due to each of the deceased's heirs. But the trustee representing that he had in hand \$1,500, he might pay into court \$377 21, in satisfaction of the claims unprovided for, and divide \$1,122 79, the residuc, between *Ann* and *Richard Jordan*, the only children and heirs of the deceased.

17th November, 1818.—KILTY, Chancellor.—The trustee is authorized and directed to pay to the register the sum of \$377 21, to be deposited in the usual manner; and of the remaining sum of \$1,122 79, to pay to the guardian of *Richard Jordan* \$561 39½; and the like sum to the guardian of *Ann Jordan*, or to herself if of age.

On the 21st of February, 1822, the auditor reported, that he had stated the claim of *Victoria Vincendiere* as No. 24, lately exhibited against the estate of the intestate *Jordan*, to pay which the proceeds were ample; but that the money paid into court had been fully applied.

23d February, 1822.—JOHNSON, Chancellor.—The trustee in

this case having died, *Mr. Jeremiah Booth*, the purchaser of the property, is authorized to pay off the claim of *Victoria Vincendiere*, as stated in this account, in part of the purchase money for the property purchased of the trustee.

On the 5th of July, 1825, *Ann Jordan*, by her petition, stated, that there was still due to her and her brother, as the heirs of the intestate, a large amount of the proceeds of the sale of his real estate; that certain bonds which had been given by the purchaser for the payment of the purchase money had been withdrawn from this court and were not then paid; that the trustee *James Cook* was dead, and administration upon his personal estate had been granted to *Henry G. Garner*; that the purchaser *Jeremiah Booth* also was dead, leaving an only child, a daughter, his heir, who had since married *John Llewellyn*, who was the administrator on the said *Booth's* personal estate; and that the purchase money had not been paid. Whereupon she prayed for relief, &c.

5th July, 1825.—BLAND, Chancellor.—Ordered, that *Henry G. Garner*, the administrator of *James Cook*, deceased, on or before the 15th day of August next, bring into court the bonds, taken by his intestate, for the purchase money; and account for all moneys which may have been received by his intestate as trustee, or which may have come to his hands; or shew cause. And it is further Ordered, that *John Llewellyn* and *Mary* his wife, upon oath, answer and say how much of the purchase money remained unpaid in the life-time of the said *Jeremiah Booth*, and how much yet remains unpaid; and that they bring into court what which is still due on or before the 15th day of August next; or shew cause. Provided that a copy of this order, together with a copy of the said petition, be served on the said *Garner*, and on *Llewellyn* and wife on or before the 20th instant.

To this order *Garner* made answer on oath, as required, by returning two of the bonds given by the purchaser which had not been paid; and by filing a copy of an account taken from his intestate's books shewing a balance of \$11 69 due to him as trustee.

After which the defendants *Ann Jordan* and *Richard Jordan* by their petition stated, that the two bonds given by the purchaser, and lately brought into court, still remained unpaid; that the purchaser *Jeremiah Booth*, deceased, had not left personal estate sufficient to pay the said debt; and that there was then no trustee to

complete the trust. Whereupon it was prayed, that a new trustee might be appointed; that the real estate which had been bought by the said *Booth* might be re-sold for the payment of the balance of the purchase money; and that they might have such relief as the nature of their case required.

3d January, 1826.—BLAND, *Chancellor*.—Ordered, that *William D. Merrick* of Charles county, be appointed trustee in place of the said *James Cook*, deceased, with all the powers with which the said *Cook* was invested by the decree of the 30th of June, 1810; and that he give bond, &c. in the penal sum of \$5,000. And it is further Ordered, that the said trustee hereby appointed proceed to make sale of the said real estate according to the terms of the said decree; unless the said *John Llewellyn* and *Mary* his wife shew good cause to the contrary on or before the 14th day of February next. Provided that a copy of this order, together with a copy of the said petition, be served on the said *Llewellyn* and wife on or before the 17th of the present month.

Llewellyn and wife, on the 9th of February, 1826, filed their answer to this petition, shewing cause as allowed by this order, in which answer they state among other things, that their intestate *Booth* had purchased the real estate as stated; that he died on the tenth of November, 1824; and that sundry payments had been made by him to *Edmund Key*, the guardian of the petitioners under the authority of this court, and with the consent of the said trustee *Cook*, &c.

After which it was agreed, that no re-sale was to be made until the auditor had stated an account ascertaining the balance due from the estate of *Booth*, the former purchaser; and that thirty days thereafter should be allowed for making payment. The report of the auditor to be affirmed, as of course, unless objected to within seven days after notice thereof. Upon this agreement the case was, by an order of the 14th of April, 1826, referred to the auditor to state an account accordingly.

In a report, filed on the 19th of June, 1826, the auditor says, that he had stated the account therewith returned between *Jeremiah Booth*, deceased, the purchaser, and estate of *Richard Jordan*, deceased, wherein he had charged the said *Jeremiah Booth* with the amount of his bonds given for the two last instalments of the purchase money. And allowed all the payments claimed by the answer of *John Llewellyn* and *Mary* his wife to the petition of *Ann*

Jordan and *Richard Jordan*; that is, No. 1, of \$1,000, paid by *Booth* to *Key* on the 15th of March 1813; No. 2, of \$115, paid by *Booth* to *Key* on the 15th of August, 1814; No. 5, of \$11, paid by *Booth* to *Key* on the 14th of January, 1817, &c. There appears due from *Jeremiah Booth*, deceased, a balance of \$2,018 93, with interest thereon from the 19th of February, 1825. And that he had stated this account at the instance of the solicitor of *Llewellyn* and wife from the exhibits filed with their answer, subject to any exceptions that the petitioners might file to any of the credits.

After which an agreement was filed in the following words, to wit: 'It is agreed in this case, that the account and report filed by the auditor, on the 19th of June, 1826, be ratified and confirmed as reported; and that the land mentioned in the proceedings be sold under the decree of this court for the payment of the balance due by the estate of *Jeremiah Booth* to the estate of *Richard Jordan*, to wit, the sum of \$2,018 93, with interest from the 19th day of February, 1825, and costs; upon the following terms, to wit, one-fourth cash, the residue in three equal annual instalments, with interest from the day of sale; Provided, nevertheless, that no sale shall be made of the said premises before the first day of September, eighteen hundred and twenty-seven. It is further agreed, that there shall be no appeal on either side. And it is further agreed, that if a sale should be made under this agreement, if it should be made appear to the satisfaction of the Chancellor, that there are other moneys due to the heirs of *Richard Jordan* from the estate of the said *Jeremiah Booth*, that then, and in that case, the proceeds of the said sale shall be applied to the payment thereof, as well as to the before mentioned sum of \$2,018 93, with interest and costs; provided there are no other claims against the estate of the said *Jeremiah Booth* entitled to a preference, or participation in the fund.'

21st March, 1827.—BLAND, Chancellor.—Ordered, that in pursuance of the foregoing agreement, the account heretofore made and reported by the auditor be ratified and confirmed; and that unless the respondents pay to the petitioners the sum of \$2,018 93, with interest thereon from the 19th day of February, 1825, and costs; that *William D. Merrick*, the trustee heretofore appointed for that purpose, proceed to make sale of the said premises pursuant to the said agreement.

On the 13th of August, 1827, the auditor reported a statement which he says was prepared at the instance of the solicitor for the

purpose of ascertaining the interests of *Ann Jordan* and *Richard Jordan* in the balance heretofore reported to be due from *Jeremiah Booth*, deceased, to the estate of *Richard Jordan*, deceased. The moneys paid to the trustee and to *Edmund Key*, as guardian to *Richard* and *Ann Jordan*, are excluded from this statement. It is impossible to ascertain the proportions in which these persons were respectively benefited. The sums so paid were legally applicable to their use in equal moieties, and it is presumed were so applied.

Under the order of the 21st of March, 1827, the trustee *Merrick* reported, that he had, on the 15th of October, 1827, sold the said tract of land called Brambly, containing $397\frac{1}{2}$ acres, with a small lot of land contiguous thereto on which was an old tobacco warehouse, to *Joseph Stone* for the sum of \$6,958 75, which sale, after the usual order *nisi*, was absolutely confirmed on the 17th of March, 1829.

On the 19th of March, 1828, *Joseph Stone* and *Alexander McWilliams* by their petition, in behalf of themselves and the other creditors of *Jeremiah Booth*, deceased, stated, that they had obtained a judgment in St. Mary's County Court, which was affirmed by the Court of Appeals at June term, 1825, against a certain *James Walker* and the said *Jeremiah Booth*, since deceased, intestate, leaving the said *Mary Llewellyn*, widow of the said *John Llewellyn*, now deceased, his only child and heir, for the sum of \$6,433 39 debt, \$13,000 damages, \$5 $6\frac{3}{4}$ costs on the original judgment, \$5 $53\frac{1}{2}$ costs on the *fiat* on the *scire facias* and costs, to be released on payment of \$6,433 39, with interest from the 13th of July, 1822, until paid, and the above costs; subject to certain credits thereon given, as appears by a copy of the said judgment therewith exhibited. That *James Walker*, the surviving defendant, was insolvent; and that the said *Jeremiah Booth* had died insolvent, and without leaving personal estate sufficient for the payment of his debts. And that there was yet a very large sum of money due to these petitioners after allowing all credits. And they had an equitable lien upon the equitable interest of the said *Jeremiah Booth*, deceased, in the real estate re-sold as aforesaid; and upon the balance of the purchase money arising therefrom, for the payment of their claim. Whereupon they prayed, that the balance of the said purchase money might be applied to the satisfaction of their claim, and for general relief.

22d March, 1828.—BLAND, Chancellor.—Ordered, that a copy of this order, together with a copy of the said petition, be served

on the said *Mary Llewellyn*, on or before the 19th day of May next, to the end that she may shew cause, if any she hath, why the said surplus should not be applied, as prayed, to the satisfaction of the just debts of the said *Jeremiah Booth*, deceased. And it is further *Ordered*, that the said trustee, by a publication of this order, to be inserted in some newspaper twice a week for three successive weeks before the 19th day of April next, give notice to the creditors of *Jeremiah Booth*, deceased, to file the vouchers of their claims in the Chancery office, on or before the tenth day of July next.

On the 20th of March, 1828, *Richard H. Lee* and *Ann* his wife, formerly *Ann Jordan*, and *Richard Jordan*, by their petition, stated, that when the sale of the 24th of September, 1810, was made of the real estate of their father *Richard Jordan*, deceased, they were infants, and *Edmund Key* was then their duly constituted guardian, and as such received from the said trustees, who made that sale, and from the said *Booth*, the purchaser, under the order of this court, out of the proceeds, and on account of the said sale, the sum of \$3,972 07, of which this petitioner *Ann* received from the said *Key* only \$167 03; and this petitioner *Richard* only \$388 22, making together but \$555 25, leaving still due to them, from the said *Key*, the sum of \$3,416 82, exclusive of interest; that the said *Booth* was one of the sureties in the bond given by the said *Key* as guardian of the petitioners; and being so liable, until that amount was fully satisfied, said *Booth* could never have obtained a legal title to said real estate; and that therefore, it was still a lien, and must operate as such upon the proceeds of said sale made by the trustee *Merrick*; or at any rate, that for such amount the petitioners were entitled to come in equally with all other creditors of every description upon the said proceeds. That the said *Key*, for some years past had been, and still was wholly insolvent; and had obtained the benefit of the insolvent laws since his receipt of the said sums of money. That since the said order for a re-sale, the petitioner *Ann* married the petitioner *Richard H. Lee*. Whereupon the petitioners prayed to have the benefit of the answer of the said *Edmund Key*, and that a *subpœna* might be directed to him; and that they might have such other and further relief as the nature of their case might require. Upon which a *subpœna* was issued accordingly.

The auditor, on the 18th of March, 1829, made a report in

which he represented that he had, from his statement of the 13th of August, 1827, stated the claims of the two heirs of *Richard Jordan*, deceased, shewing a balance, including interest up to the date of the present report, of \$1,630 66, due to *Lee* and wife as claim No. 1; and \$399 91 still due to *Richard Jordan*, the other heir, as claim No. 2; which sum awarded to *Richard* was claimed by *Thomas W. Harris* and the said *John Llewellyn*, as his assignees. That on the claim of *Stone* and *McWilliams*, No. 3, which was on a judgment recovered against the said *Jeremiah Booth*, deceased, and a certain *James Walker*, there was due, including interest up to the 15th day of October, 1827, the day of the sale by the trustee *Merrick*, the sum of \$5,754 98; but there being no proof of the insolvency of *Walker*, only one moiety thereof was allowed out of *Booth's* estate. And that of the amount claimed by the petitioners *Lee* and wife and *Richard Jordan*, of \$1,000 paid by the said *Booth* on the 15th of March, 1813; \$115 paid by the said *Booth* on the 15th of August, 1814; and \$11 paid by the said *Booth* on the 14th of January, 1814; and \$430 66 paid by the late trustee *Cook* on the 13th of January, 1819, after giving the admitted credits, there remained a balance, including interest, of \$1,718 64, as having been paid to the said *Edmund Key*, their guardian, for whom the said *Booth* was surety, there was no proof; and that, if there were, it ought to be postponed to the claim No. 3.

Immediately after which, on the same day, an agreement was filed in the following words, *to wit*: 'It is admitted, that *Jeremiah Booth*, the deceased, was one of the securities upon the bond executed by *Edmund Key*, as guardian of the petitioners *Richard Jordan* and *Ann Lee*; that said *Key* was duly appointed and qualified as guardian of said petitioners; that the payments appearing to have been made to him out of the proceeds of the first sale of the land in the proceedings mentioned by the auditor's report and account, this day filed, were made to him while he was such guardian; and that only such part thereof was paid by him to, or for the said petitioners, as is credited in said account; and that the said *Key* is and was, at the time of the re-sale of said property, wholly insolvent. It is also admitted, that the petitioner *Ann* is the wife of the petitioner *Richard H. Lee*.'

By agreement the auditor, on the 17th of July, 1829, stated and reported an account awarding to *Thomas W. Harris* \$118 15, and to *William H. Plowden*, administrator of *John Llewellyn*, deceased,

\$281 76, as assignees of *Richard Jordan*, being the full amount due him, as heir, for his share of the purchase money, as stated by the auditor's report of the 18th of March, 1829. And on the 31st of July, 1829, the auditor made another statement, in conformity thereto, awarding, as before, \$1,630 66 to *Lee* and wife, as their share of the before mentioned admitted balance of the purchase money, leaving the sum of \$4,609 58 of the proceeds of the sale made by the trustee *Merrick*, unappropriated. Which report was, by an order of the 30th of September, 1829, confirmed, and the proceeds directed to be applied accordingly.

Stone & McWilliams, by their petition, asked leave to take testimony in support of their claim against the estate of *Jeremiah Booth*, deceased, for its whole amount, by proving the insolvency of *Walker, &c.* Which leave, by an order of the 24th of June, 1830, was granted as prayed; and testimony was accordingly taken and filed proving the insolvency of *Walker*.

After which the petitioners *Lee* and wife and *Richard Jordan*, excepted to the auditor's report of the 18th of March, 1829. 1. Because they were entitled to be preferred to the amount of their claim over the other creditors. 2. Because, if not entitled to be preferred, they were to come in equally for it with such creditors. 3. Because they were therein charged with the sum of \$555 25, as if the same were admitted by their petition to be an amount received by them in addition to the amount already charged to them, or credited to *Jeremiah Booth* in the auditor's account filed on the 19th of June, 1826, and otherwise charged to them in the accounts and proceedings in this case; while, in fact, the said sum of \$555 25 is the aggregate of items marked in said account filed on the 19th of June, 1826, No. 3, 4, 5, 6, 7, 8 and 12; and in that account accordingly credited to the said *Booth*; the items No. 5, \$11, and No. 7, \$157 03, being those assumed by *Ann* the petitioner, in her said petition as received by, and paid for her separate account, in all \$167 03; and items No. 3, \$98; No. 4, \$40 15; No. 6, \$134 91; No. 8, \$50; and No. 12, \$65, being in like manner there so assumed by the petitioner *Richard*; being in all \$388 22; as these respective totals are apportioned in said petition. And 4. Because the said *Booth* is not charged with the further sum of \$219, part of the commission of *James Cook*, the trustee, which sum said *Cook*, in his account reported by him on the 13th of February, 1819, to the court, declares he paid over to the guardian of the petitioners, *Edmund Key*, for their use. The

petitioners accordingly insist, that said sum be charged with interest thereon from the 31st December, 1812.

18th January, 1831.—BLAND, *Chancellor*.—The exceptions to the auditor's report standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

Before we proceed it may be well to take a retrospective view of the proceedings in this case to see how the present litigants, by the consequences of, and the allowable ingraftments upon the original suit, have come in, or been brought before the court, in order, that we may the more clearly understand the relative positions which they hold, and the nature of the present controversy.

The original bill was filed by a creditor in behalf of himself and the other creditors of *Richard Jordan*, deceased, to have his real estate sold for the payment of his debts. That real estate was sold accordingly. Sundry other creditors came in, and established their claims, and a distribution of the proceeds of that sale, so far as was necessary to satisfy all those creditors, has been made among them. The original bill, as to them, has performed its office; and the suit, as to the original plaintiff and all others who became associated with him, for a similar purpose, has been thus brought to a final conclusion.

It appears, however, by the order of the 23d of February, 1822, that although the proceeds of sale were amply sufficient to pay all the creditors; yet, as all the moneys which had been brought into court, by the trustee, had been applied as directed; it became necessary to authorize the *purchaser* to pay the last of the claims which had been brought in and established; because of the trustee's being then dead. It being deemed safe and convenient upon that, as on former occasions, to authorize a payment directly from the purchaser to a creditor, or party, or even the assignment to a creditor, or party of the purchasers' bonds, without requiring the proceeds to be collected by and passed through the hands of a trustee in payment. (a)

But before the original cause of suit had been thus brought to a conclusion by the payment of all the debts of the intestate *Jordan*, the trustee having died, and there appearing to be a large amount of the purchase money still remaining unpaid, to be collected and passed over to the then infant, now adult, heirs of the deceased

(a) *Spurrier v. Spurrier*, 1 Bland, 475; *Kilty v. Quynn*, ante 212.

debtor ; and it also appearing, that the guardian of the infant heirs had come in, and asked to have the surplus paid to him ; that a large sum had been ordered to be paid to him ; and that *Booth*, the purchaser, was then dead, it became necessary to ascertain the amount of the purchase money then due ; and also from whom it was to be collected.

Considering a trustee, appointed to make a sale under a decree, as an officer or agent of the court, bound by the terms and manner of his appointment, to obey its orders ; and to hold himself ready to account at all times and immediately when called on ; and holding, on the death of such a trustee, that his responsibility, so far as regards any property which may have come to his hands, in virtue of the trust reposed in him, devolves upon his personal representatives ; the court deemed it to be entirely within the scope of its powers ; and also to be most beneficial for all concerned to proceed in a summary way against the administrator of this deceased trustee. (b) Accordingly, upon an order to shew cause, *Henry G. Garner*, the administrator of the trustee *James Cook*, deceased, without objecting to the legality of such a mode of proceeding, as indeed he could not, answered so fully as to shew, admitting the truth of the circumstances set forth by him, that his intestate had fully discharged his duty in all respects ; and the truth of his answer not having been controverted, the proceedings against him were thus, at once, brought to a close ; and he too was thus discharged from all concern with any further proceedings in the case.

But on its being also alleged by the heirs of the intestate *Jordan*, that there was a large amount of the purchase money unpaid ; it was found that the court could not deliver itself of the property which it had undertaken to administer, without calling on the purchaser to pay what remained due ; and on his failing to do so, to proceed against him. According to the principles of the English adjudications there could be no doubt, that the purchaser himself might, by a summary proceeding, at the instance of any one interested, be compelled to comply with his contract, and pay the purchase money. This court, it was confidently believed, might, upon similar principles, proceed in a like summary manner to enforce the payment of the purchase money. (c) And it could have

(b) *Williamson v. Wilson*, 1 Bland, 435 ; *Gilb. Execu.* 17.—(c) *Andrews v. Scotton*, 2 Bland, 629 ; *Casamajor v. Strobe*, 1 Cond. Cha. Rep. 195.

had no hesitation, at the instance of any one interested, so to have proceeded against the purchaser *Jeremiah Booth* himself; but he was dead. His liability, however, it was obvious, had, in this respect, devolved upon his representatives, so far as they had assets. And therefore, an order was passed, calling on his heir and administrator to pay the balance of the purchase money, or shew cause. *John Llewellyn* and wife accordingly, among other things, shewed for cause, that the deceased purchaser *Booth* had, as they alleged, under the authority of the court, and with the consent of the trustee, made sundry payments to the trustee, and also to *Edmund Key*, the guardian of the infant heirs, leaving a balance still due, &c. Whereupon it was agreed and adjudged, that no more than \$2,018 93 of the purchase money then remained due. There was no doubt, that the court, as the vendor, for the benefit of all concerned, to the extent of the purchase money unpaid, held an equitable lien upon the estate sold to *Booth*; and there was no doubt, that in virtue of that equitable lien a re-sale of the estate might be made for the payment of the purchase money. Upon those grounds therefore, the trustee *Merrick* was appointed; and a re-sale was ordered and made accordingly.

Thus, by a consequence of the original suit, a new controversy arose, after the original plaintiff had been satisfied, and had departed from the case, between the original defendants, now placed in the position of plaintiffs against the representatives of the deceased purchaser as defendants. This new controversy, as regarded the balance of the purchase money, admitted to be due, was, by its payment, in that particular, terminated; and the case, in that respect also, finally brought to a close.

The heirs of *Richard Jordan*, deceased, had, however, by their petition alleged, that a large amount of the purchase money had, during their infancy, under the order of the court, been paid to *Edmund Key*, their guardian, by the trustee *Cook*, and by the purchaser *Booth*, and been wasted by the said *Key*, who had thereafter become and then was insolvent; and that *Booth*, the purchaser, having been bound, in a guardian's bond, as one of his sureties, they had a lien upon *Booth's* estate for the amount so paid to and wasted by *Key*. Therefore, as *Key* was, as they alleged, no party to these proceedings, they prayed, that he might be summoned as such, that they might have the benefit of his answer. It being a general rule, that all co-obligors must be made parties, it seemed to have been conceived to be proper thus to ask to have *Key*

brought before the court. But, admitting, that he had not by his petition to have the proceeds paid to him submitted to be treated as a party, as a co-obligor who is insolvent need not be made a party; *Key*, who was alleged and shewn to be so, was not a necessary party; since no decree against him could be of any avail; and his answer, as such, could not be read against any other party. Consequently, all further proceedings against him being useless, the case as to him also was thus brought to a final close.

But *Stone & McWilliams*, by their petition, stated that they were judgment creditors of *Jeremiah Booth*, deceased, who had died without leaving personal estate sufficient to pay his debts; or any other real estate than that which had been sold under the decree in this case, leaving a large surplus of the proceeds of sale still undisposed of; and that his administrator *John Llewellyn*, was dead, leaving a widow *Mary*, who was the daughter and only heir of *Booth*. This new cause of complaint, thus ingrafted by this petition upon the remaining stock of this case, gave to it an entirely new character, and converted it into a creditor's suit against the heir of *Jeremiah Booth*, deceased.

As regards the claim of *Stone & McWilliams*, as here presented in conflict with that of the heirs of *Richard Jordan*, deceased, there can be no occasion, at present, to notice the heir of *Booth*; and the case, as to her, may, so far as regards the question now to be determined, be considered as finally closed; since it has been thus, in fact, reduced to a mere contest between these two rival creditors of *Jeremiah Booth*, deceased, arising out of their respective claims to a preference of satisfaction out of the surplus of the proceeds of the sale of his real estate.

It has been urged, that *Jeremiah Booth* had at no time, during his life, any thing more than a mere imperfect right or equitable interest in the real estate from the sale of which this surplus has arisen; and that his estate was not one upon which the judgment of *Stone & McWilliams* could give them a lien.

This objection points to a portion of our law of a most important bearing, and of frequent application; and yet is one which has not, that I know of, been any where carefully examined and considered. I shall, therefore, avail myself of this occasion to take a more comprehensive view of the subject than might otherwise have been deemed necessary for the determination of this case.

According to the law of England, a judgment of a court of common law operates as a general lien upon all the real estate of the defendant, which may be taken in execution and sold, or delivered under an *elegit*, or extended by a statute merchant or statute staple for the satisfaction of such judgment or recognizance. This lien is not the result of any principle of the common law applicable indiscriminately to all judgments in favour of a creditor; but arises out of the liability of the real estate to be taken in execution and sold at the common law, or out of the statutes that give the *elegit*, and recognizances called statute merchant and statute staple, by virtue of which the lands of the debtor were generally made liable to be sold, delivered, or extended; (d) and although only a moiety of the land could be taken under an *elegit*; yet the lien is general and comprehends all the lands held by the debtor, as well those which he had at the time of entering up the judgment as those which he may have subsequently acquired. And this lien fastens upon the real estate on the day the judgment is rendered. (e) This judgment lien is a uniform consequence of the real estate being liable to be taken and extended under an execution issuing upon such judgment. Wherever then such a liability exists, the lien arises as the constant incident of such a judgment; and where the property cannot be taken in execution, there is no lien. It will, therefore, be sufficient in this, or any similar case, to shew the liability of the real estate to be so taken in execution, to establish the existence of the lien. (f)

The lien upon a real estate, which is incident to a judgment against its owner, extends no further than to cover the whole of that right which he himself might have voluntarily transferred to his creditor in satisfaction of his debt; its operation is always limited by the extent of the debtor's power of alienation. The alienation of lands is either voluntary, as by deed *inter vivos*, or by last will and testament; or it is involuntary as by attachment of law.

During the existence of the feudal system, all kinds of alienation by the feudatory were prohibited, because of their being contrary to the tenor of the grant. The tenant could not will or

(d) 13 Ed. 1, c. 18; 11 Ed. 1; 13 Ed. 1, stat. 3; 27 Ed. 3, c. 8 and 9; 36 Ed. 3, c. 7; 23 Hen. 8, c. 6; Forum Rom. 87.—(e) 2 Inst. 469; Gilb. Execu. 37; Gilb. Court of Excheq. 93; Jefferson v. Morton, 2 Saund. 6; Underhill v. Devereux, 2 Saund. 69, 71.—(f) Powel Mortg. 255, n. K., 273, n. O.; Harris v. Saunders, 10 Com. Law Rep. 373.

devise his land ; or in any way encumber it with the payment of his debts ; and hence a creditor who had recovered judgment against him, could not take it in execution for the satisfaction of his debt ; so that, by the feudal law, lands were entirely exempted from being taken in execution, and sold for the satisfaction of the debts of the holder. The feudal restrictions upon voluntary alienations, were giving way before the general spirit of the times, when the statute *de donis* repeated what the law of tenures had before said, that the tenor of the grant should be observed ; and this created that pernicious species of fettered inheritances called estates tail ; which have also yielded to public utility ; and have at length, in our country, been almost totally annihilated. The right of alienation by last will and testament, has been made absolute in almost all respects. (g)

The restrictions upon involuntary alienation by attachment of law, have not been so entirely removed. The tenant may, in some cases, voluntarily alien his estate where it cannot be at all, or to a very limited extent, affected by an execution upon a judgment against him. As in the case of a mere empty legal estate, the trust of which is possessed by another ; (h) or in the instance of a tenant in tail, whose estate has been saved from the operation of the act to direct descents ; (i) who may, if he thinks proper, bar the intail in the manner allowed by the act of Assembly, and alien the estate ; (j) yet if he neglects or refuses to dock the intail, and have it converted into a fee simple in himself, his creditor, who has obtained a judgment against him, can only take the estate during his life, in satisfaction of his debt ; and after his death it will pass to the heir intail, entirely discharged from all the debts and incumbrances of the last tenant intail. (k) Therefore, although a judicial lien can extend no farther, in any case, than the defendant's power of alienation ; yet it is not in all respects co-extensive with it. But where the real estate is devisable by law, no disposition can be made of it to the prejudice of creditors ; and therefore, it may be safely affirmed, that a judicial lien is, in most respects, commensurate with the legal right of testation. (l)

(g) *Taylor v Horde*, 1 Burr. 115 ; June, 1773, ch. 1 ; November, 1782, ch. 23 ; *Newton v. Griffith*, 1 H. & G. 111.—(h) *Finch v. Winchelsea*, 1 P. Will. 278 ; *Forth v. Norfolk*, 4 Mad. 503.—(i) 1820, ch. 191 ; *Newton v. Griffith*, 1 H. & G. 129.—(j) June, 1773, ch. 1 ; November, 1782, ch. 23.—(k) *Paca v. Forwood*, 2 H. & McH. 175 ; *Ridgely v. McLaughlin*, 3 H. & McH. 220 ; *Laidler v. Young*, 2 H. & J. 69.—(l) 3 and 4 W. & M. c. 14 ; 1 Fonb. 284 ; *Kinaston v. Clark*, 2 Atk. 204 ; *Hammond v. Gaither*, 3 H. & McH. 218.

From all which these general principles seem to follow, that, at common law, lands not being alienable by the feudatory, and therefore not liable for the payment of his debts, it was presumed, that he was trusted only upon his personal security; and the judgment being in pursuance of the contract, was only to recover a personal thing; and the execution following the judgment went only against the goods; (*m*) that a statutory and judgment lien attaches on no real estate which is not liable to be taken in execution; that it in no case extends beyond the debtor's power of voluntary alienation; and that it fastens upon the realty subject to all superior rights and prior liens by which that power of alienation is or may be limited or restrained, as by a right of dower, prior mortgages, &c. (*n*)

From a very early period, it appears to have been common to lease lands for years; but such leases were originally and most usually granted to mere husbandmen, whose interest was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price, than as having any property of their own; and therefore, they were not allowed to have a freehold estate; but their interest, such as it was, vested after their deaths in their executors, who were to make up the accounts of their testator with the lord and his creditors, and were entitled to the stock upon the farm. Hence it grew into an established principle, that these leases, or chattels real, as they are called, might be taken in execution and sold like mere moveables, for the satisfaction of debts. (*o*)

Here there is no leasehold estate in question; and therefore, in speaking of this judgment lien, my remarks must be confined to freehold estates upon which such a lien may attach. (*p*)

According to the ancient law of England, a villein being himself a subject of property, whatever property he himself acquired might be taken and held by his owner as an incident, or perquisite of his right of property in such villein. Consequently, if an executor had a villein for years, and the villein purchased lands in fee, upon which the executor entered, he should have the whole fee simple; but because he had the villein in *autre droit*, that is, as executor, it should be assets in his hands. (*q*) This is a sin-

(*m*) Gilb. Execu. 3.—(*n*) Bac. Abr. tit. Dower, G.; Abergaveny's case, 6 Co. 79.—(*o*) 2 Blac. Com. 141.—(*p*) Powel Mortg. 605, 609, 611.—(*q*) Co. Litt. 117, 124.

gular instance in which lands held in fee simple might become assets in the hands of an executor; and, as such, liable, by the common law, to be taken and sold for the payment of the debts of the deceased to whose estate the perquisite had accrued. But as villenage has long since ceased in England, this law has certainly become obsolete there; yet I can see no reason why the same law might not be applied in Maryland as to any real estate which might be conveyed to a slave with the consent of his master, who held him as an executor or administrator. (r)

Where a man by his writing obligatory under seal bound himself and his heirs for the payment of a sum of money and died, leaving an estate in lands which descended to his heir; the creditor, on obtaining judgment upon his obligation against the heir, might, by the common law, not by any statute, take in execution all the lands which descended to the heir; although he could not have had execution of any part of them against the ancestor himself. This ensued as a necessary consequence of allowing the ancestor to bind his heir as well as himself for the payment of a debt. For, having given an action against the heir, the creditor could have had no fruit of his action unless the lands descended could be taken in execution; because the goods and chattels of the deceased belong to his executor or administrator, and the lands only descend to the heir; and neither of them could be charged further than to the amount of the assets which came to his hands. But if the obligee sues and obtains judgment against the obligor, in his life-time, the debt is placed upon a new and a different foundation; and the claim becomes extinct as a debt resting upon a security by which the heir is bound. The judgment extinguishes it as a bond debt, and discharges the heir. And therefore, a bond creditor who has thus obtained judgment cannot after the death of the ancestor, by a *scire facias*, or in any other manner charge the heir, or affect the lands which may have descended to him. Whence it appears, that, in some instances, at common law, a creditor might be in a better situation before than after he had obtained a judgment against his debtor. (s)

In all cases, at the common law, if the party who should be

(r) Hall v. Mullin, 5 H. & J. 190; Cunningham v. Cunningham, Cas. Conf. North Carol. 353; Walker v. Bostick, 4 Desau. 266.—(s) Davy v. Pepys, Plow. 439; Sir William Harbert's case, 3 Co. 12; Drake v. Mitchell, 3 East. 258; Kington v. Clark, 2 Atk. 204; Galton v. Hancock, 2 Atk. 428; Stileman v. Ashdown, 2 Atk. 609; Powel Mortg. 598, 777.

charged had aliened the land, *bona fide*, before any action brought, the land in the hands of the purchaser was not subject to any charge or execution. A bond is not properly an incumbrance upon land; for it does not follow the land like a judgment. But if an action of debt be brought against the heir upon the obligation of his ancestor, and the heir aliens the land pending the suit; yet shall the land, which he had at the institution of the suit, be charged; because, the action was brought against him in respect of the land. Hence it appears, that the common law lien of a bond creditor as against the heir, relates to the institution of the suit and fastens on the land from that time. Consequently, where there were two creditors, *A.* and *B.* of *J. S.* whose heir was bound, and who had lands by descent. And *A.* brought suit and obtained judgment by default on the first of March, 1686, upon which he issued a general *elegit* against all the lands of the heir, a moiety of which was delivered to him accordingly. And *B.* who had instituted his suit on the first of July, 1684, and obtained a special judgment against the assets confessed by the heir on the first of September, 1686. It was held, that although *B.*'s judgment was subsequent to *A.*'s, yet *B.*'s having relation to the institution of the suit, which was commenced before *A.* obtained his judgment, it operated as a lien from that time, and therefore must be first satisfied. (*t*)

Land in the English colonies was considered as partaking much more than in England of the nature of mere commercial property. (*u*) It is said, that there are instances of colonial estates having been sold under the authority of the Court of Chancery of England; according to the law of which court, where a bond or judgment creditor was under the necessity of going into equity to reach the real estate of his debtor, he would not be compelled, as at law, to wait until he could, as under an *elegit*, obtain satisfaction according to an extended value; but the court would accelerate the payment by ordering a sale of a moiety of the estate or so much as might have been extended at law. (*w*)

(*t*) Co. Litt. 102; Sir William Harbert's, 3 Co. 12; *Gree v. Oliver*, Carth. 245; Bac. Abr. tit. Execution, I; 2 Blac. Com. 340, n. 71; Bull. N. P. 175; 2 Harr. Ent. 689.—(*u*) Attorney-General v. Stewart, 2 Meriv. 153.—(*w*) *Roberdeau v. Rous*, 1 Atk. 544; *Higgins v. The York Buildings Company*, 2 Atk. 107; *Kinaston v. Clark*, 2 Atk. 206; *Stonehewer v. Thompson*, 2 Atk. 441; *Stileman v. Ashdown*, 2 Atk. 481, 609; S. C. Amb. 13; *Curtis v. Curtis*, 2 Bro. C. C. 633; *Leaby v. Dancer*, 12 Cond. Chan. Rep. 164.

Before the year 1732, it was, in general, true, that lands in Maryland were no otherwise liable to be taken or extended in satisfaction of debts than according to the law of England; and prior to that time there are many instances in which lands were so extended by *elegit*. But the peculiar circumstances of the province; the scarcity of money, and the small proportion of personal to real estate seem to have given rise to a wish among the people, that land should, in some way, be made entirely subject to be seized and sold for the satisfaction of debts. This general disposition is indicated by some principles peculiar to our law in relation to imperfect legal titles; to equitable interests in land; and to the real estates of deceased debtors which were established as a part of our code antecedent to that period.

In that interval of time between the designation of a tract of land, by a specification of a special warrant or otherwise, and the obtaining of a patent for it, the purchaser was considered as the holder of an inchoate legal title, a perfectible legal interest regarded as a sort of chattel real, which upon being completed by a patent was deemed a legal title, from the date of such designation, to all intents and purposes. So long as the right remained as a chattel real it was, like all other chattels, liable to be taken in execution and sold for the satisfaction of debts; but a patent, by perfecting the legal title, immediately removed it beyond the reach of creditors in that way. To prevent this any creditor was allowed to file a *caveat* in the Land Office for the express purpose of stopping a patent, and so continuing the interest as a chattel real, and keeping it within reach of his remedies. But this imperfect legal title, although deemed a chattel real for the benefit of creditors, was, in all other respects, considered as real estate; and as such descended to his heirs, and did not pass into the hands of the executor or administrator. Yet where the debtor himself, not having, during his life-time, perfected his title, had died without heirs, a patent was directed to be issued to his executor or administrator to be treated as assets for the satisfaction of his debts and legacies. These were the settled rules of law with regard to any specified tract of land for which an individual had obtained from the Lord Proprietary an imperfect legal title short of a patent. (x)

But such a peculiar chattel real, as it was called, must not be confounded with a mere common warrant, before it had been laid

(x) Land Hol. Assis. 91, 115, 251 and 494, note.

upon any land, which was considered as nothing more than a general authority to acquire a title to so much vacant land anywhere within the state. Such a common warrant, not being the commencement of a title to any land in particular, was always considered as mere personalty, as a sort of *chose in action*, which, on the death of the holder, was held to be assets in the hands of his executor or administrator. And these principles of law seem to have been affirmed by legislative enactments since that time. (*y*)

There is a singular instance to be met with among the records of the Land Office, in which lands were made liable for the satisfaction of the debts of its deceased owner. Instead of an extent, or an absolute sale of a part, as in England, in acceleration of payment; an inquest was ordered to ascertain the annual value of the whole, and what number of years at that value, would be equal to the whole amount of the debts due; and then a lease was sold, clear of dower and all other incumbrances to a bidder for the shortest term not exceeding the time so ascertained. (*z*)

There appears to have been several private acts passed at an early period of the provincial government, authorizing the sale of the lands of deceased debtors for the payment of their debts; (*a*) but it does not seem to have been a common practice; nor to have been an occasional mode of interposing to remove an evil or supply a defect in the general law.

In the year 1732, at the instance and solicitation of merchants, resident in Great Britain, trading to this country, the British Parliament passed an act making lands in all the colonies liable to be taken in execution and sold for the satisfaction of debts. Whatever were the motives for passing this statute, it is certain, that it was most manifestly just in itself; and was such a one as fully met the approbation of the people of Maryland. (*b*) It at once

(*y*) 1793, ch. 101, sub ch. 14, s. 3.—(*z*) Land Hol. Assis. 218; *Harvey v. Harvey*, 3 Rep. Chan. 87.—(*a*) 1704, ch. 13; 1720, ch. 23; 1727, ch. 20.

(*b*) 'The British merchants,' says Governor Pownal, 'at times applied to Parliament on the affairs of the colonies. Hence we find enacted the navigation act, &c. Also acts: 1. Altering the nature of their estates, by treating real estates as chattels; 2. Restraining them from manufactures; 3. Regulating their money; 4. Altering the nature of evidence in the courts of common law, by making an affidavit of a debt before the Lord Mayor of London, &c. certified in writing an evidence in their courts in America; 5. Dissolving indentures, by discharging such of their servants as should enlist in the king's service.'—*Pown. Admin. Colonies*, 126—*4th edition*, published in 1763.

This, to us, most important statute, having a very limited operation upon the interests of the people of England, is so rarely noticed in any of the English law

removed a long train of difficulties and inconveniences, and was accordingly adopted almost immediately without opposition and

books in use among us, that I have deemed it proper to insert it here entire and verbatim from the British statute book.—5 George 2, c. 7.

‘An act for the more easy Recovery of Debts in his Majesty’s Plantations and Colonies in America.’

‘Whereas his Majesty’s subjects trading to the *British Plantations* in America lie under great difficulties, for want of more easy methods of proving, recovering and levying of debts due to them, than are now used in some of the said Plantations; And whereas, it will tend very much to the retrieving of the credit formerly given by the trading subjects of Great Britain to the natives and inhabitants of the said Plantations, and to the advancing of the trade of this kingdom thither if such inconveniences were remedied.

‘*May it therefore please your Majesty that it may be enacted, And be it enacted by the King’s Most Excellent Majesty, by and with the advice and consent of the Lord’s Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the twenty-ninth day of September which shall be in the year of our Lord one thousand seven hundred and thirty-two, in any action or suit then depending, or thereafter to be brought in any court of law or equity in any of the said Plantations, for, or relating to any debt or account wherein any person residing in Great Britain shall be a party, it shall and may be lawful to and for the plaintiff or defendant, and also to and for any witness to be examined or made use of in such action or suit, to verify or prove any matter or thing by affidavit or affidavits in writing upon oath, or in case the person making such affidavit be one of the people called Quakers, then upon his or her solemn affirmation, made before any mayor, or other chief magistrate of the city, borough or town corporate in Great Britain, where or near to which the person making such affidavit or affirmation shall reside, and certified and transmitted under the common seal of such city, borough, or town corporate, or the seal of the office of such mayor, or other chief magistrate, which oath and solemn affirmation every such mayor and chief magistrate shall be, and is hereby authorized and empowered to administer; and every affidavit or affirmation so made, certified and transmitted, shall in all such actions and suits, be allowed to be of the same force and effect, as if the person or persons making the same upon oath or solemn affirmation as aforesaid, had appeared and sworn or affirmed the matters contained in such affidavit or affirmation viva voce in open court, or upon a commission issued for the examination of witnesses, or of any party in any such action or suit respectively; provided that in every such affidavit and affirmation, there shall be expressed the addition of the party making such affidavit or affirmation, and the particular place of his or her abode.*

‘2. *And be it further enacted by the authority aforesaid, That in all suits now depending, or hereafter to be brought in any court of law or equity, by or in behalf of his majesty, his heirs and successors, in any of the said Plantations, for or relating to any debt or account, that his majesty, his heirs and successors, shall and may prove his and their debts and accounts, and examine his or their witness or witnesses, by affidavit or affirmation, in like manner as any subject or subjects is or are empowered, or may do by this present act.*

‘3. *Provided always, and it is hereby enacted, That if any person making such affidavit upon oath or solemn affirmation as aforesaid, shall be guilty of falsely and wilfully swearing or affirming any matter or thing in such affidavit or affirmation, which, if the same had been sworn upon examination in the usual form, would*

entirely; as well those provisions for obtaining proof of debts in Great Britain, (c) as that section which subjected all lands to be taken in execution and sold for the payment of debts. (d) But the first section which gave a new mode of taking proof in Great Britain, then a part of the common empire, must have been renounced by our Declaration of Independence, by which all community of law and government between Great Britain and Maryland was severed. (e) In those of the colonies in which lands had been made liable to be taken in execution by their own laws, this statute was unnecessary; and, as indicated in its preamble, was not intended to apply to, and was therefore not adopted by them. (f) It was reluctantly, but finally submitted to in Jamaica. (g) In North Carolina, it was received and applied much in the same manner as in Maryland. (h) In South Carolina, Georgia and Jamaica, it was adopted and so applied as that, on the death of the debtor, his real estate was converted, with re-

have amounted to wilful and corrupt perjury, every person so offending, and being thereof lawfully convicted, shall incur the same penalties and forfeitures as by the laws and statutes of this realm are provided against persons convicted of wilful and corrupt perjury.

‘4. *And be it further enacted by the authority aforesaid*, That from and after the said twenty-ninth day of September, one thousand seven hundred and thirty-two, the houses, lands, negroes, and other hereditaments and real estates, situate or being within any of the said Plantations belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands, of what nature or kind soever, owing by any such person to his majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process, in any court of law or equity, in any of the said Plantations respectively, for seizing, extending, selling or disposing of any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of the said Plantations respectively are seized, extended, sold or disposed of, for the satisfaction of debts.’

Every honest man should by his will charge his real estate with the payment of his debts; he who omits it, is said to sin in his grave.—*Per Ld. Mansfield*; *Wyndham v. Chetwynd*, 1 Burr. 430.

A singular instance is mentioned of a fraud perpetrated by a bishop who invested his money in land to prevent his creditors from obtaining satisfaction after his death.—1 *Hallam Const. His. Eng.* 275, note 5.

(c) *Rawlings v. Stewart*, 1 Bland, 22, note.—(d) *Davidson v. Beatty*, 3 H. & McH. 608, 612.—*Chancery Proceedings*, lib. W. K. No. 1, fol. 1.—(e) *Lewis v. Bacon*, 3 Hen. & Mun. 89.—(f) *Graff v. Smith*, 1 Dall. 481; 4 Com. Dig. 228, 245; *Wilkinson v. Leland*, 2 Peters, 658; *Robinson v. Noel*, 2 Cas. Cha. 145; *Blankard v. Galdy*, 4 Mod. 226.—(g) 2 *Edwards’ His. West Ind.* 366; 2 *ibid.* 214.—(h) *Baker v. Webb*, 1 Hayw. 62; *Winstead v. Winstead*, 1 Hayw. 243.

spect to the payment of his debts, into personalty; and as such, held to be assets in the hands of his executor or administrator for the benefit of his creditors. (i) In Virginia, that section which subjected lands to the payment of debts, was rejected and nullified, as an unconstitutional encroachment upon her sovereign rights; (j) but the first section providing a mode of collecting proofs in Great Britain, was admitted to be in force there until our Declaration of Independence. (k)

It has been often said, that this statute in itself made a distinction between the people of Great Britain and those of the colonies; that domestic debts were not included by it; and that by an equitable construction only it was so extended as to embrace Maryland as well as British creditors. (l) It is true, that it may have been passed at the instance of British merchants; and the first section which makes provision for the manner of proving debts, could, from its nature, be only applied for the benefit of those resident in Great Britain, and not to the inhabitants of the Plantations. But the fourth and most important section, and the only one now in force, makes no distinction whatever as to the residence or domicile of the party. On the contrary, all distinctions arising from the local situation of the party, or his being a subject resident in Great Britain, or in the colonies, or in any other part of the British dominions, or his being a subject trading to the Plantations, are expressly excluded by the strong phraseology of the law itself; by which it is declared in the clearest terms, that the real estate situate in the Plantations, shall be chargeable with all just debts owing by any person to his majesty, or any of his subjects; without any allusion whatever to the residence, domicile, or trading character of the subject or persons thus described as debtors or creditors; nor is there any distinction as to the kind of debts; the estate is made chargeable with all just debts, duties and demands of what nature or kind soever.

Real estates having been thus made 'subject to the like remedies, proceeding and process,' as personal estate, towards the satis-

(i) *Galphin v. McKinney*, 1 McCord, 292; *Telfair v. Stead*, 2 Cran. 418; *Thompson v. Grant*, 1 Russ. 540, note; *Will. Exrs.* 1017.—(j) 1 *Jefferson Corr.* 106; 1734, ch. 25, 4 Hen. Stat. 452; 1744, ch. 40, 5 Hen. Stat. 292; 1748, ch. 12, 5 Hen. Stat. 526; 1759, ch. 34, 7 Hen. Stat. 328; 1761, ch. 28, 7 Hen. Stat. 450.—(k) *Lewis v. Bacon*, 3 Hen. & Mun. 89.—(l) *Morgan v. Davis*, 2 H. & McH. 12; *Donaldson v. Harvey*, 3 H. & McH. 13; *Davidson v. Beatty*, 3 H. & McH. 608; *Kilty's Rep.* 250; *Taylor v. Thompson*, 5 Peters, 358.

faction of such debts as were 'due by bond or other specialty;' it followed as a necessary consequence, that upon a judgment against the debtor himself his lands might be taken and sold by a *fiery facias*; and in order that the writ itself should express this new extension of the authority it gave, the words 'lands and tenements,' were inserted so as expressly to command the levy to be made 'of the goods and chattels, lands and tenements,' of the defendant. (m)

The English statute of 1285, (n) declares, that 'when a debt is recovered or acknowledged in the king's court, or *damages* awarded, it shall be henceforth in the election of him that sueth for such debt or damages to have' an *elegit* to extend one-half of his land, &c., which gives the election immediately as soon as the debt is recovered; and therefore, the land is bound immediately from the time of the recovery of the debt; (o) and so the words of this statute of 1732, fixes the liability of the whole from the time of the recovery; and therefore, the lien attaches from the date of the judgment. (p) The English statute of 1285, gives the *elegit* to obtain satisfaction for 'such debt or damages.' This statute of 1732, speaks only of 'debts, duties, and demands;' and would seem to have relation only to cases arising between persons who stood in the relationship towards each other of debtor and creditor before the institution of the suit. But it has been always construed to extend to all cases where the plaintiff recovered a judgment for a certain sum of money, and thereby became a creditor of the defendant; although the foundation of such a judgment debt was, in truth, not a pecuniary claim, but a mere trespass or personal injury. Hence this statute of 1732, like some others in which the same terms are used, comprehends not only debts, in their proper sense, but duties or things due, as covenants, rents, fines, issues, or just causes of action; for, debt, in its large sense, signifies whatever a man owes. (q)

This statute of 1732 specifies the extent of the liability of lands, by declaring that they shall be assets in like manner as real estates are by the law of England liable to debts due by bond; and shall be subject to the like remedies, proceedings and process in any court of law or equity, for seizing, extending, selling or disposing of them, and in like manner as personal estate. From which last

(m) 2 Harr. Ent. 678.—(n) 13 Ed. 1, c. 18.—(o) Gilb. Execu. 37.—(p) *Hampson v. Edelen*, 2 H. & J. 64.—(q) 2 Inst. 198, 397; 1 Niebuhr's *His. Rom.* 437.

expressions it would seem, and it has been so understood by some here, that land might be taken in execution by process emanating from any court whatever; as well from the lowest as from the highest, and as well from a court of record as from one not of record. If so, there can be no doubt that lands might be taken and sold by virtue of an execution issuing upon a judgment rendered by a justice of the peace. (r)

But this statute of 1732, points to another analogy which casts much light upon this subject; it declares, that lands shall be assets in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond. Now it is clear, as has been shewn, that lands, in England, can only be made liable as assets for the satisfaction of such debts by a suit in a common law court of record, or in a Court of Chancery. Whence it may be strongly inferred, that as land cannot be taken in execution under any process emanating from a court not of record in England, it cannot be sold by virtue of an execution upon a judgment rendered by a justice of the peace here, whose jurisdiction, in regard to small debts, cannot, in any respect, be considered as that of a court of record. And besides, where lands are sold under a *fieri facias*, it is necessary that the execution should be returned in order that there may be written and recorded evidence of the title so conveyed; but, although an execution from a justice of the peace may be returned, there is no law authorizing it to be recorded, and recognized as evidence of that grade and for that purpose. (s)

This statute of 1732, provides, that houses, lands and other hereditaments and real estate, shall be chargeable with all just debts; and then proceeds to declare, that they shall be assets for the satisfaction thereof in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond. This latter specification of the *manner* of the liability, has been considered as an indication of the kind of the real estate intended to be embraced by it; and taking this as the criterion by which to ascertain how far any interest in lands or real estate of any description should be considered as having been subjected to the payment of debts by this statute, it has been applied, certainly to

(r) *West v. Hughes*, 1 H. & J. 6; 1799, ch. 86; 1801, ch. 42, s. 2.—(s) 1809, ch. 76, s. 4; 1814, ch. 52; *Duvall v. Waters*, 1 Bland, 590. This matter has been since disposed of by the act of 1831, ch. 290. *Den. v. George*, Taylor's Rep. 22.

the full extent of the English law ; and, in some instances, apparently in accordance with the previously settled principles in relation to imperfect legal titles and equitable interests, carried farther as to such interests ; although nothing more than the legal title or equitable interest of the defendant could, in any case, be sold ; as to which the purchaser is considered as standing in the place of the defendant. And therefore, it has been held, that a real estate held intail could not be subjected to the payment of the debts of the tenant intail further than to the extent of his interest ; so that, after his death, the heir intail should take the estate, as by the law of England, entirely unincumbered with any such liability. (1)

By this statute of 1732, 'the houses, lands, negroes, and other hereditaments and real estate,' belonging to any person indebted, are made liable for all his just debts. The lien which a creditor obtains by his judgment upon the real estate of his debtor, arises as a necessary consequence from this liability. Therefore, such a lien only fastens upon that which may properly be denominated real estate ; because by the statute of frauds it is declared, that no writ of execution shall bind the property of the goods of the party against whom it issued, but from the time of its being delivered to the sheriff. In reference to this distinction, therefore, it may often be necessary to ascertain whether the property of the debtor be, in fact, real estate or not.

It may also frequently become necessary to ascertain whether *the thing* be real or personal estate, not only with a view to the nature and commencement of the lien by which it is proposed to be bound ; but also in reference to its ownership, so as to shew whether it can be, in any manner, liable to be taken in execution under the writ by virtue of which it may be attempted to be sold. For, no real estate can be bound by a judicial lien but that which belongs to the defendant ; nor can any real or personal estate but his be taken in execution. Hence, in reference to the parties to the judgment, it may be necessary to ascertain whether the thing has been so incorporated with the inheritance as to have vested in the landlord, or to have passed to the heir, or him in reversion or remainder ; or whether the thing be one of those kinds of fixtures which a tenant may remove during his term ; or which, as personal estate has vested in the particular tenant, or has passed to the executor or administrator of the deceased owner of the land.

(1) Gilb. Execu. 41, 42 ; *Ridgely v. McLaughlin*, 3 H. & McH. 220.

As between vendor and vendee, mortgagor and mortgagee, and as regards the mere question of the title of the defendant, *land*, in the legal signification, comprehends all ground, soil, or earth whatever; all minerals are, in this sense, component parts of land; and it comprehends tide-water rivers, lakes, and running streams, as so much land covered with water; it includes all houses, fences, and structures upon the ground; and it also embraces all vegetable productions, as trees, herbage, grass, &c., standing upon and growing out of the soil. (u) If either the owner of the fee simple, a particular tenant, or even a wrong doer builds a house, or annexes to a house then standing upon the land any glass windows, wainscot, benches, doors, vats, furnaces, or the like, they are thereby immediately blended with the land itself, become parcel of it, and vest in the owner of the inheritance. (w) All these things are embraced by the phrase *land*, in the legal and comprehensive sense of that term; and being so considered as real estate, can only be taken in execution and sold under this statute; and therefore, as such, are bound by the lien consequent upon a judgment against the owner of the inheritance. (x)

But this general rule of law has been considerably relaxed in favour of tenants, and of executors and administrators in England, where land is not liable to be taken in execution and sold by creditors, with a view, as against the heir or owner of the inheritance, to have the fund for the payment of debts extended as much as possible, and also for the public good. (y)

There are some modes by which a tenant may rest a structure upon the land, which precludes the inferences that it was intended to be an annexation to the inheritance; as in the case of the barn erected upon pattens. (z) And it has been held, that a tenant may take away, during the term, things which he himself affixed to the premises for the purposes of his trade and manufactures; such as furnaces, coppers, salt pans, steam engines, cider mills, a varnish house and the like; and besides these mere trade fixtures, such others as he has put up at his own expense, for the ornament and furniture of his house; as hangings, pier glasses nailed to the

(u) Co. Litt. 4.—(w) Co. Litt. 53; *Herlakenden's case*, 4 Co. 62.—(x) *Ryall v. Rolle*, 1 Atk. 175; *Ex parte Quincy*, 1 Atk. 477; *Steward v. Lombe*, 5 Com. Law Rep. 167; *Winn v. Ingilby*, 7 Com. Law Rep. 214; *Colegrave v. Dias Santos*, 9 Com. Law Rep. 30; *Am. and Fer. Fixtures*, ch. 5; *Bradley v. Osterhoudt*, 13 Johns. 404; *Kirwan v. Latour*, 1 H. & J. 289.—(y) *Lawton v. Lawton*, 3 Atk. 13.—(z) *Elwes v. Maw*, 3 East. 38.

wall, ornamental chimney pieces, slabs, blinds, &c. And a tenant who is a nurseryman or gardener, may remove trees, shrubs, &c. All these things, although attached to the realty, are regarded as personal chattels in favour of creditors; and therefore are not affected to the prejudice of the tenant or his creditors, by a lien consequent upon a judgment against the landlord; but may be taken under an execution against the tenant by whom they were put upon the land. But they are only considered as chattels in favour of the tenant and his creditors during the term; for, after that time, if left upon the land, they become parcel of the inheritance. And they are only considered as chattels when placed upon the land by a tenant; for, if put there by the owner of the fee simple, they are then considered as parcel of the realty. As, however, there seems to be as yet no clear and well settled principles of law laid down in relation to what are commonly called fixtures, each case must depend on its own peculiar circumstances. (a)

It is in general true, that all the vegetable productions of the earth, while standing or growing upon the soil, are considered as parcel of the land itself. But they become mere personal property so soon as they are severed from it; and, as such, belong to the owner of the inheritance; unless they are at one and the same time severed and taken away. In which case, not having so rested upon the land, after having been severed, as to vest in the owner of the inheritance, in their new character of mere personality, they are held to be a portion of the land. And consequently, in the one case, the wrong doer can only be treated as a trespasser, while in the other he may be charged either criminally or civilly with an illegal asportation of the goods and chattels of another. (b)

By the common law a creditor might take, under a *fieri facias*, the present annual profits of his debtor's land; that is, all fruits and crops growing, such as wheat, corn, tobacco, hemp, carrots, hops, &c., and when ripe he might have had them cut, gathered, and sold as any other mere personal property. As these fruits

(a) Beck v. Rebow, 1 P. Will. 94; Dudley v. Warde, Amb. 113; Lawton v. Lawton, 3 Atk. 13; Poole's case, 1 Salk. 368; Fitzherbert v. Shaw, 1 H. Blac. 258; Elwes v. Maw, 3 East. 38; Wyndham v. Way, 4 Taunt. 316; Lee v. Risdon, 2 Com. Law Rep. 69; Bull, N. P. 34; Am. and Fer. Fixtures, ch. 2; Holmes v. Tremper, 20 John. 29; Van Ness v. Pacard, 2 Peter. 137; Steward v. Lombe, 5 Com. Law Rep. 168; Buckland v. Butterfield, 6 Com. Law Rep. 18; Farrant v. Thompson, 16 Com. Law Rep. 62.—(b) Herlakenden's case, 4 Co. 62.

could not be actually taken before they were ripe and fit to be gathered, a creditor might be deprived of them by the debtor's aliening the land before they could be taken; but if a growing crop be sold under a *fieri facias*, the title of the purchaser vests from that time against all others, and he may gather it when ripe. (c)

All annual industrial fruits; such as corn, hops, &c., are commonly called *emblements*. And these emblements on the death of the owner of the land in fee simple, or intail, pass to his executor; and so too, in various cases, the executor of the tenant for life shall have the emblements; and consequently, in all such cases, where the *fieri facias* is levied in the life-time of the debtor, as it evicts the personal property, so taken, from the executor of the deceased, the emblements which otherwise would have passed into the hands of the executor, may, when they ripen after the death of the debtor, be gathered and sold under the *fieri facias*. But if the owner of the land devises it to another, and dies, then, as the emblements pass to the devisee, the creditor will be thus, as by an alienation by deed, deprived of all satisfaction which he might otherwise have obtained from them. Considering the reason of these rules of law, it would seem, that the lien of a judgment obtained against the owner, in his life-time, would not, of itself, evict the emblements from the executor of the deceased, and prevent them from passing in their ordinary course as personalty. (d)

Besides those subjects of property which constitute a part of the land, as fixtures or emblements, there are others of an incorporeal nature which are in no way visibly attached to the land; but yet are considered as real estate, though they lie not in tenure; because they issue out of, or concern, or are annexed to, or are exercisable within a corporate, tangible and visible inheritance, which is or may be holden; such as rents, estovers, common, or any other profits whatever granted out of land which savour of the realty; and are, therefore, in most respects, regarded as real estate. Under this general description of incorporeal hereditaments, various kinds of very valuable and productive property are compre-

(c) *Peacock v. Purvis*, 6 Com. Law Rep. 154. It has been since declared, that where land shall have been rented in consideration of a render of a portion of the crop, or for a specific amount of produce, it shall not be lawful, under any process against the tenant, to sell the crop before it shall be divided, but the same may be sold subject to the lessor.—1831, ch. 171.—(d) Com. Dig. tit. Execution, C. 3 and C. 4; Am. and Fer. Fixtures, 173; Jac. Dict. v. Emblements.

hended. As an assessment upon lands; a towing-path, a toll-gate, turnpike road stock, canal stock; and, in general, the stock of any incorporated, or joint stock company, the profits of which are derived chiefly, or altogether, from land used in any way whatever. (e)

The consequences of considering all these various kinds of incorporeal hereditaments as real estate, are, that they may be intailed; that, in the absence of any special legislative provision upon the subject, they can only be assigned, or transferred from one to another by the same written solemnities made necessary by law to pass lands; that is, all contracts concerning them must be made according to the provisions of the statute of frauds, and the acts of Assembly which require contracts for land to be in writing and recorded; and all devises of them must be in conformity with those legislative enactments respecting wills of real estate. If the owner of them dies intestate they descend to his heirs, and his widow is entitled to dower therein. And they will be considered as assets like lands, at common law, in the hands of the heir only so far as he may be expressly bound by the obligation of his ancestor.

To this extent the principles of the common law, in relation to this species of property, appear to be clear of all ambiguity and difficulty. But to ascertain how far any of this kind of property is liable to be taken and sold by virtue of a *fieri facias*; and consequently is subject to a judicial lien, it will be necessary to advert to other rules and principles than those by which the difference between real and personal property is defined.

At the time when the principles of the common law in relation to the distinction between real and personal property became established, but a small proportion of the property of the community seems to have been of that incorporeal kind which is now so very large in amount and so productive. Hence, in the spirit of the simplicity of the common law, it was deemed safest and best to confine the power of the creditor over the property of his debtor to that alone which was visible, tangible and capable of being distinctly valued, sold and transferred, as affording an ample scope for the creditor to obtain the satisfaction to which he was entitled.

(e) Co. Litt. 19; Morgan v. Mansel, 2 Plow.; The King v. The Mayor of London, 4 T. R. 21; The King v. Page, 4 T. R. 543; Drybutter v. Bartholomew, 2 P. Will. 127; Buckeridge v. Ingram, 2 Ves., jun., 652; Knapp v. Williams, 4 Ves. 430, note; Finch v. Squire, 10 Ves. 41; Powel Mortg. 142.

Upon these principles the writ of *fiery facias* was framed, and in concise and general terms expressed the nature and extent of the sheriff's power and duty. The language of the execution imports, that the goods and chattels, which are the subject of it, are property of a tangible nature, capable of manual seizure, and of being detained in the sheriff's custody, and such as are conveniently capable of sale and transfer by the sheriff, to whom the writ is directed, for the satisfaction of a creditor. The legal interest in a term for years, both in respect to the possession of which the leasehold property itself is capable; and also in respect of the instrument by which the term is created and secured, both of which are capable of delivery to a vendee, has been always held to answer the description of the writ, and to be saleable thereunder. So the terms of the writ embraced all the present profits of the debtor's lands; and, consequently, any crop, although it then grew upon and was considered as a part of the land itself, might be cut, gathered and sold. A rent service, or rent charge, both of which are regarded as realty; and a reversion, after a particular estate then in existence, and any estate for life; or the interest which a husband holds, *jure uxoris*, during coverture might, under the statute of 1285, be extended by *elegit*; and therefore a lien attached upon all such freehold interests from the date of the judgment. (*f*)

That the stock of a turnpike company, or of a canal company, must, upon common law principles, be considered as real estate is sufficiently clear; but whether such stock may be extended as such under an *elegit*, or may be sold under a *fiery facias*, is not so certain. In England such stock is commonly declared to be real estate by the act of incorporation itself; (*g*) but here it has, in several instances, been declared to be personal property. It would seem, that even considered as realty, no lien would attach on obtaining a judgment against the holder unless it could be shewn, that it might be taken in execution; but for that I have met with no authority. If on the other hand such stock should be considered as personalty, then it is clear, even supposing it could be taken in execution, that no lien would arise from the judgment but merely from the execution. (*h*) It is, however, certain, that

(*f*) 2 Inst. 394; Underhill v. Devereux, 2 Saund. 69; Arbuckle v. Cowtan, 3 Bos. & Pull. 322; Scott v. Scholey, 8 East. 467; Gilb. Execu. 39; Powel Mortg. 255, note K, 599, note W.—(*g*) Powel Mortg. 24, note.—(*h*) Shaw v. Wright, 3 Ves. 22; Knapp v. Williams, 4 Ves. 430, note. It has been since provided by the act of 1832, ch. 307, that under a *fiery facias*, or attachment, any interest which the defendant

in all such cases, where this or any other species of property has been fraudulently or unjustly placed beyond the reach of creditors, a court of equity will interpose and give relief, by setting aside any fraudulent conveyance which may stand in the way; and by ordering the stock to be sold for the benefit of such judgment creditor. (i)

Besides those embarrassments as to the liability of property to be taken in execution arising out of its nature, considered as real or personal; corporeal or incorporeal, there are others occasioned by the peculiarity of the title to it, or the interest of the party against whom the judgment has been obtained.

A rent seck is a species of realty, and may be, in some sense, regarded as the profits of land; yet since it is intangible, and utterly incapable of any manual seizure, or of being taken into the custody of the sheriff; and as a bare rent cannot be delivered *ut liberum timentum*, it cannot be taken and sold under a *fieri facias*. (j) The same reason would seem to apply to all mere charges, incumbrances, or beneficial privileges on land. As where a father, by his will, after devising his lands to his sons, gave his daughter the right, privilege and liberty, of residing in the houses and using and cultivating the land in common with his sons, so long as she remained single; (k) or where a testator gave his wife a home at his mansion-house until his son should attain his full age; (l) or where he gave his land to his son in fee, upon condition, that he should maintain his daughter, or pay her sixty pounds annually during her natural life. (m) These charges were held to be liens upon the land; but as an execution cannot be levied on a lien which a judgment creditor has obtained upon the lands of his debtor, because a lien gives no title to the thing, or interest in the land itself, but merely a power, by levying an execution upon it to have it sold or applied in satisfaction of the claim, (n) it would seem, that none of those peculiar liens could be taken and sold under a *fieri facias*; and consequently, that no judicial lien could attach upon any such pre-existing lien.

may have in the capital or joint stock of any corporation, or in the debt of any corporation transferable on its books, may be taken and sold in the manner therein prescribed. But whether a lien fastens upon any such property from the date of the judgment or only from the delivery of the *fieri facias* to the sheriff, or otherwise, remains to be determined.—(i) *Horn v. Horn*, Amb. 79; *Caillaud v. Estwick*, 2 Anstr. 331; *Denton v. Livingston*, 9 John. 96; *Hadden v. Spader*, 20 John. 554.—(j) *Powel Mortg.* 599, note W.—(k) *Warfield v. Gambrill*, 1 G. & J. 503.—(l) *Addison v. Bowie*, 2 Bland, 606.—(m) *Rebecca Owing's case*, 1 Bland, 290.—(n) *Harding v. Stevenson*, 6 H. & J. 267.

These several kinds of property or rights may therefore be regarded as other instances, in which the liability of beneficial interests in land to be taken in execution, falls short of the power of alienation; for these, and indeed almost every species of contingences may, in equity, be bound by contract for valuable consideration. (o)

It was a general rule, that the legal estate only could be held liable; and therefore, at common, no use or trust in land could be taken in execution on a judgment against the *cestui que use*; nor could any such interest be extended under an *elegit*; because the statute only referred to lands according to the common law. A statute passed in the year 1483, was the first which subjected uses to an execution upon a judgment; (p) which became obsolete after the statute of 1535, for transferring uses into possession. (q) An act passed in the year 1503, was, however, the first which made uses liable to be taken in execution in express terms. (r) But the subsequent revival of uses, under the name of trusts, called for a further interposition of the Legislature; and accordingly by the statute of frauds of 1676, pursuing the language of the statute of 1483, as to uses in respect of trusts, it is declared, that it shall be lawful for the officer to whom any writ shall be directed at the suit of any person upon any judgment, to do, make, and deliver execution unto the parties in that behalf suing of all such lands as any other person shall be seised or possessed in trust for him against whom execution is sued. (s) This provision of the statute of frauds is, however, confined to estates of freehold or lands and tenements, and says nothing as to trusts of chattel interests; consequently, an equitable interest in a term for years could not be taken in execution and sold by a *fieri facias*. It has also been expressly decided in England, that an equity of redemption of a term for years could not be taken in execution by a *fieri facias*. And upon the same principles it would seem necessarily to follow, that an equity of redemption of the freehold could not be extended under an *elegit*. But, as the judgment created a lien upon the equity of redemption of the freehold, the creditor might obtain the benefit of his judgment by going into a court of equity and redeeming any prior incumbrance. (t)

(o) *Conrad v. The Atlantic Insurance Company*, 1 Peter. 443; *Wright v. Wright*, 1 Ves. 409; *Carleton v. Leighton*, 3 Meriv. 667.—(p) 1 Rich. 3, c. 1.—(q) 27 Hen. 8, c. 10.—(r) 19 Hen. 7, c. 15.—(s) 29 Car. 2, c. 3, s. 10.—(t) *Powel Mortg.* 235, 309, 601; *Scott v. Scholey*, 8 East. 467; *Metcalf v. Scholey*, 5 Bos. & Pull. 461.

It having been finally settled in Maryland prior to the year 1732, that the immature legal titles awaiting perfection in the Land Office, of which there is now, and always has been a great multitude, were liable, as a species of chattels real, to be taken in execution and sold by a *feri facias*, it was to be expected, that in construing and applying the statute of 1732, it would be made to embrace at least all analogous cases of equitable interests, or those inchoate titles which one individual had obtained a right, by a bill for a specific performance, to call upon another to perfect and make a legal title. And there is strong reason to believe that this statute had been always so construed and applied.

Where in England a debtor had, by his will, charged his real estate with the payment of his debts and died without heirs, so that the property escheated, his creditors might have the benefit of such charge by a bill in Chancery making the Attorney-General a party. (u) In Maryland the statute of 1732 having subjected all lands to the payment of debts, did that, in general, which, in England, was only occasionally done by the debtor himself; and consequently, here the Legislature by various acts, in affirmance of the previous course of proceeding, declared, that such escheated real estates might, by bill in Chancery, to which the Attorney-General should be made a party, be sold and applied, *without preference*, in satisfaction of the debts of the deceased owner. (w) And recognizing the liability of equitable interests to the same extent as legal estates, a similar mode of reaching such equitable interests was given to creditors, where their debtor, who held any such interests, had died without heirs. And it was provided, that the purchaser of such equitable interests under the decree should stand in the place of the person who had died seised or possessed thereof, and might sustain a bill for a specific performance against the holder of the legal estate. And it was further declared, that where any sales of any such equitable titles have been made by virtue of any writ of *feri facias*, or decree, the purchaser thereof should have the same title thereto as if the purchase had been made in virtue of the provisions of that act. (x)

These legislative enactments recognize the previously settled law, and affirm the fact, that equitable interests had been before that time taken in execution and sold under writs of *feri facias*.

(u) Mitf. Plea. 172.—(w) October, 1780, ch. 51, s. 5; 1785, ch. 73.—(x) 1792, ch. 44; 1794, ch. 60; 1795, ch. 88, s. 2 and 3.

Their liability is spoken of as the then established law. It is not said in general terms, that as against those holding such equitable interests, their creditors were in all cases without remedy; but 'that the creditors of such persons are *often* without remedy either at law or in equity.'

After the passage of these laws, it was held, in June, 1800, by the Court of Appeals, that an equitable interest in real estate was liable, at the suit of a creditor, to attachment, condemnation and sale, for the satisfaction of a debt due by its owner. (y) The court is not reported to have given any reasons for their judgment; but the decision was considered at that time, as having established the general rule of law, that all equitable interests might be taken in execution under a *fiery facias* as well as by an attachment. In October of the same year the Chancellor declared, that he so understood it, and says, that 'he cannot otherwise than remark, that the decision appears, from transactions in this court, and in the Land Office, agreeable to the opinion of the late *Chancellor ROGERS*, as well as of the present Chancellor;' that is, during the time of the first Chancellor of the Republic. (z) And in the year 1821, these general principles seem to have been again affirmed by the Court of Appeals. (a)

But whatever doubts may have been entertained, as to the existence of the general rule, they have been entirely removed by the act which declares, that any equitable estate or interest which a defendant named in a writ of *fiery facias* may have in any lands, tenements or hereditaments, may be taken, seized and sold by virtue of such writ, and the purchaser shall have such title assigned to him, and in all respects stand in the place of the person whose title he has purchased. (b) Whether this act shall be considered as having merely affirmed a pre-existing general rule, or as having itself introduced and established a new regulation upon the subject, there yet will remain some difficulty to be removed.

It seems to be agreed even upon English principles, that a judgment is not a lien upon a mere empty legal estate, and that it cannot be extended under an *elegit*; (c) while on the other hand it must be admitted, that where the whole equitable interest is in the defendant leaving nothing more than a mere empty legal title

(y) *Campbell v. Morris*, 3 H. & McH. 535; *Pratt v. Law*, 9 Cran. 456, 495; *Campbell v. Pratt*, 5 Wheat. 429.—(z) *Hopkins v. Stump*, 2 H. & J. 302.—(a) *Ford v. Philpot*, 5 H. & J. 312.—(b) 1810, ch. 160.—(c) *Powel Mortg.* 274, note.

in any one else, such equitable interest must, according to this law, be held liable to a lien, and to be taken in execution on a judgment against such defendant. (*d*) But between these extremes, where the lines shall be drawn, and how the relative interests of the parties shall be adjusted, may be, in some cases, the cause of much perplexity; and that not merely in this court; for, by means of this act of Assembly cases involving and resting upon a mere question of equity may thus consequentially be brought within the jurisdiction of a court of common law. (*e*)

It will be seen from what has been said, that the lien of a judgment at common law arises altogether from the liability of the freehold to be taken in execution and extended or sold for the satisfaction of such judgment. According to the English law, although a *decree* is equal to a judgment in the administration of the personal assets; yet it gives no such lien upon the *realty* as that arising from a judgment; because a decree acts only *in personam*, not *in rem*; and the remedy upon a decree to affect land is only for a contempt, whereupon the party proceeds to sequestration, which is a mere personal process. (*f*) But a writ of sequestration binds from the very time of awarding it, and not only from the time of its being laid or of its delivery to the sheriff; and in that respect it gives a lien earlier than a *fieri facias*. (*g*) But where lands or the profits of lands, which is all one, are directly in demand, as where the lands or their profits were charged with the payment of a legacy to the plaintiff, the title is bound from the time of filing the bill, and every purchaser *pendente lite* comes in at his peril. (*h*)

The act of Assembly prescribes the order in which the debts of a deceased debtor shall be paid out of his *real* as well as out of his *personal* assets, giving a preference to judgments, and thus recognizing the lien to which they give rise; but it is silent as to decrees. (*i*) The testamentary system puts judgments and decrees upon the same footing in the administration of the *personal* estate; but does not intimate, that a decree gives rise to any lien upon the realty like that attendant upon a judgment at law. (*j*) There is

(*d*) *Jackson v. Willard*, 4 John. Rep. 41.—(*e*) *Scott v. Scholey*, 8 East. 467; *Archer v. Snapp*, Andrews, 341; *Hopkins v. Stump*, 2 H. & J. 301; *Harding v. Stevenson*, 6 H. & J. 264.—(*f*) *Powel Mortg.* 547; *Ram. on Assets*, 292.—(*g*) *Burdett v. Rockley*, 1 Vern. 58; *Bligh v. Darnley*, 2 P. Will. 621; *Forum Rom.* 87.—(*h*) *Crofts v. Oldfield*, 3 Swan. 278, note.—(*i*) 1735, ch. 80, s. 7.—(*j*) 1798, ch. 101, sub ch. 8, s. 17.

then no direct legislative enactment upon the subject ; and no case is recollected in which the point has been decided by the Court of Appeals.

But it has been declared by an act of Assembly, that 'it shall and may be lawful for the Chancellor to issue attachment of contempt, attachment with proclamations, and also sequestration against the defendant, until the decree shall be fully performed, fulfilled and executed, and the contempts cleared, or to order process of sequestration to issue to compel a performance of the said decree, by an immediate sequestration of the real and personal estate and effects of the defendant, or such part thereof as may be sufficient to satisfy the demand of the plaintiff in the decree specified and decreed, and to clear the contempts ; or to issue *fieri facias* against the lands, tenements and hereditaments, goods and chattels of the defendant or defendants, upon which sufficient property shall be taken and sold to satisfy the demand of the plaintiff in the decree specified, (k) or a *capias ad satisfaciendum* may be issued against the defendant or defendants by the Chancellor, upon which there shall be the same proceeding as at law.'

By this act, as by the English statute giving the *elegit*, an election has been given to the party, immediately on obtaining a decree, not merely to sue out the old personal process or to have an execution directing the *half* of the defendant's lands to be delivered to him at an *extended value* ; but to have the former process, or a *fieri facias*, by which the *whole* of the defendant's lands may be taken in execution and *sold* to satisfy the demand of the plaintiff. Whence it necessarily follows, that as lands have been thus made liable to be taken in execution and sold to satisfy a decree, and by the same process as to satisfy a judgment at common law, a decree must, in like manner, give rise to a lien which will bind the land of the defendant. (l)

At common law a plaintiff may, at once, sue out a *capias ad satisfaciendum* and a *fieri facias* upon his judgment, and have recourse to the one or the other at his election, so that they be not both of them executed at the same time. (m) But, as from the complex nature of some decrees, requiring certain acts to be performed as well as the payment of money, a *fieri facias* cannot, in

(k) 1785, ch. 72, s. 25.—(l) *Bligh v. Darnley*, 2 P. Will. 622 ; *Forum Rom* 87.—(m) *Miller v. Parnell*, 1 Com. Law Rep. 414 ; *Primrose v. Gibson*, 16 Com. Law Rep. 78.

its nature, cover the whole subject of the decree, it would seem, that the plaintiff should not be allowed to vex the defendant unnecessarily by having two or more executions against him at the same time; that is, to execute a *fiery facias* for the recovery of the money, and a *capius ad satisfaciendum* or attachment to enforce a specific performance; but should take one such execution, as, from its terms, may embrace the whole of what he claims under the decree. (n) But even in the case of such complex decrees if the plaintiff is satisfied, or waives all but the money demand, he may then have a *fiery facias* for that. And therefore it would seem, that, as to mere money demands at the least, this act of Assembly has virtually given to decrees in equity an incidental lien upon real estate, similar to that which is attendant upon a judgment at common law.

In the case under consideration, the sale to *Jeremiah Booth* was made before, but not ratified until some time after the passage of the act making equitable interests liable to be taken in execution. (o) It could not be considered as a complete bargain and sale; as a perfect contract between the court and *Booth* until it was finally ratified and assented to by both parties. And as that was not until after the passage of that act, it must therefore be treated as a case in all respects, and in every point of view, fully within it as to time. In regard to the nature of the equitable interest in the land which *Booth* acquired by this contract, I am also entirely satisfied that it is such a one as must be held to be embraced by that act.

The principle is believed to be universal, that a judicial lien can

(n) *DICKINS v. HIFFNER*.—In this case a decree having been passed for a conveyance of a tract of land as therein specially described, and also for costs; the plaintiff by his petition, on oath, stated, that the defendant had been regularly served with a copy of the decree, but had complied with no part of it. Whereupon he prayed an attachment, which was awarded and returned attached. After which the plaintiff by petition prayed for a *fiery facias* for the costs; and an attachment of contempt for the non-performance of the other part of the decree.

1807.—*KILTY, Chancellor*.—The Chancellor was not satisfied that he had the power, under the act (1785, ch. 72, s. 25) to issue a *fiery facias* in the manner prayed. The allowance of that kind of execution appears to be for cases in which the property sold can satisfy the demand of the plaintiff in the decree specified. It is possible, that if every other part of the decree was complied with, a *fiery facias* might then issue for the costs; but it does not appear regular to issue one kind of execution or process for one part of the decree, and another for another. The party may either proceed with his attachment in the usual manner, or without proceeding on the one served, take out a writ of *capius ad satisfaciendum* against the defendant, as that kind of execution will go to the whole.—M. S.—(o) 1810, ch. 160.

only attach upon real estate or an equitable interest in such an estate subject to all prior liens or incumbrances; and that the first lien is, in all cases, entitled to a prior satisfaction, unless it be intrinsically defective. (*p*) If the legal estate in fee in this land, had been vested in *Booth*, and he had mortgaged it, the judgment and lien of *Stone & McWilliams* would only, according to the English law, have given them the right to come here and redeem the prior mortgage; or, according to our law, to have had the land sold, and after satisfying all prior liens to have had the residue of the proceeds of sale applied in whole or in part satisfaction of their claim. Here, the equitable lien held by the court for the benefit of the creditors and heirs of the late *Richard Jordan*, was a prior incumbrance which must be satisfied: and the proceeds of sale remaining after that, represents the amount and value of that equitable interest in the land upon which the judgment of *Stone & McWilliams* gave them a lien which followed that interest from the land to the proceeds of sale, so as to entitle them to be paid out of that fund in preference to any subsequent lien upon that interest, or any other of the creditors of *Jeremiah Booth*. (*q*)

It is clear then, that the judgment of *Stone & McWilliams* did give them a lien upon the equitable interest held by *Jeremiah Booth*; but the circumstances of this case suggests another inquiry, in relation to this point, and that is, whether their lien continued to be in full force, at the time they filed their petition, so as to overreach any intermediate claims against *Booth's* estate; and to continue to them their right to a preference in satisfaction.

At common law, a man, by a judgment, authenticated his debt, and thereby obtained authority to sue out execution within a year and a day; but, if he failed to do so, it was presumed to be paid; and the defendant might plead payment and a release of such recorded debt; because all judgments were to be rendered effectual within a competent time, which was the same as in case of non-claim. This time of limitation of judgment was the same in real as in personal actions; for though the judgment on a real action settled the right to the land, as in the personal it did to the thing in demand; yet that judgment could not lie dormant forever, to be executed at any time; for then dormant judgments would overreach conveyances between parties, which would be produc-

(*p*) *Powel Mortg.* 435; *Rankin v. Scott*, 12 *Wheat.* 179.—(*q*) *Davidson v. Clayland*, 1 *H. & J.* 546; *Jones v. Jones*, 1 *Bland*, 451; *Lewis v. Zouche*, 2 *Cond. Chan. Rep.* 470.

tive of the greatest evils, and the most mischievous consequences; and therefore, there was but a year's time allowed to execute such judgments, as between party and party; where however, the state was plaintiff it might sue out execution at any time after the year without a *scire facias*. But in debt, if the judgment was not executed, the debt was presumed to be paid, when the judgment lost its force; and therefore, the common law, in such case, gave no *scire facias* but a new action. (r)

This limitation to the issuing of an execution on a judgment, between party and party, has been repeatedly recognized by our Legislature as being founded, like all other limitations, upon a presumption of satisfaction; and as being, on that ground, an effectual bar to that mode of recovery; and consequently, as furnishing conclusive evidence of the extinction of the lien; since, as has been shown, there can be no lien where there is no right to issue execution. (s)

The statute which gave the *scire facias* as a new mode of reviving a judgment in personal actions, (t) made no alteration as to the time within which such judgments were to be executed; nor has the act which declares, that on all judgments, thereafter to be rendered, a *fiery facias* may issue at any time within *three* years from the date of such judgments, (u) made any other alteration whatever in the existing law. And therefore if a plaintiff, after the time allowed for suing out execution, revives his judgment, its attendant lien can only operate prospectively; and not with any retrospective effect, so as to overreach any intermediate incumbrances or alienations; for, although, as between the parties to the judgment when revived, it may be permitted to operate as a lien upon the property of the defendant from its date; yet, as a legal relation is never suffered to work a wrong, it cannot be allowed to bind the property as against any intermediate incumbrancer, or *bona fide* purchaser, without notice, but from the date of its revival; (w) and so too, as to deeds, to the validity of

(r) Gilb. Execu. 12, 26, 92, 95; Gilb. Court of Exchequer, 166; Anonymous, 2 Salk. 603; Stileman v. Ashdown, 2 Atk. 609; Eppes v. Randolph, 2 Call. 125; Nimmo v. The Commonwealth, 4 Hen. & Mun. 57; Coleman v. Cocke, 6 Rand. 629; Rankin v. Scott, 12 Wheat. 179; The United States v. Morrison, 4 Peters, 124. (s) May, 1766, ch. 7; February, 1777, ch. 15, s. 7; October, 1778, ch. 21, s. 7; Bac. Abr. tit. Limitation of Actions, E. 6.—(t) 13 Ed. 1. C. 45.—(u) 1823, ch. 194. (w) Jacob Law Dict. v. Relation; Heapy v. Parris, 6 T. R. 368; Lord Mahon's case, 6 Mod. 59; Anonymous, 3 Atk. 521; Fothergill v. Kendrick, 2 Vern. 234; Bothomly v. Fairfax, 2 Vern. 751; S. C. 1 P. Will. 335.

which, recording is necessary, the recording of them, after the time prescribed, is not allowed to affect, by relation, the rights and interests of intervening purchasers or creditors. (x)

Such is the nature and continuance of the lien upon real estate arising from a judgment. And, upon similar principles, as a judgment does not, of itself, give rise to any lien upon personal property; and as the lien upon it can only commence, according to the statute of frauds, from the day of the actual delivery of a *fiery facias* into the hands of the sheriff, so it continues no longer, by virtue thereof, upon such property than it may be levied upon by such writ of *fiery facias*; that is, until its return day; after which, if it can be so continued at all, it can only be by the immediate renewal of such execution, or the instant delivery of another *fiery facias* to the sheriff. (y)

But if a judgment be given on a writ of annuity the plaintiff shall have execution, within the year, after every day of payment, though it be many years after the judgment. (z) And so, if the terms of the judgment suspends for a time the issuing of execution; or the execution be stayed by an appeal, or writ of error; or the issuing of an execution be prohibited by an injunction, an execution may be issued at any time, within the time allowed, after the expiration of such suspension or stay, or after the dissolution of the injunction; and consequently, the judicial lien, in all such cases, is so far continued. (a)

The presumption of satisfaction may however be repelled, and the lien sustained in full force by the issuing of an execution, and continuing to re-issue an execution within the time allowed by law after the return of each execution, for any length of time. (b) And so too, where there was a judgment rendered in May, 1787, by virtue of which a lien then fastened upon the land of the defendant; and another judgment rendered in November, 1791, under which that land was regularly taken in execution and sold; and the purchaser who was, in 1796, summoned and appeared to a *scire facias* on the judgment of 1787, as terre-tenant, without

(x) 1785, ch. 72, s. 11; 1831, ch. 204; Pannell v. The Farmers Bank, 7 H. & J. 202.—(y) Oades v. Woodward, 1 Salk. 87; Heapy v. Parris, 6 T. R. 368; Williams v. Bradley, 2 Hayw. 363.—(z) 2 Inst. 471.—(a) 2 Inst. 471; Blacklock v. Maddox, 2 Harr. Ent. 694; 1799, ch. 79, s. 10; 1826, ch. 157; Underhill v. Devereux, 2 Saund. 72, c. note; Michell v. Cue, 2 Burr. 660; Franklin v. Thomas, 3 Meriv. 234.—(b) 2 Inst. 471; Bac. Abr. tit. Scire Facias, C. 1; Bing. Execu. 161; Cooke v. Batthurst, 2 Show. 235; Mullikin v. Duval, 7 G. & J. 355.

insisting upon the presumption of satisfaction of that judgment, to prevent its lien from being revived so as to overreach that of the judgment of 1791, under which he claimed, unqualifiedly admitted, that the judgment of 1787, had not been paid or in any manner satisfied; it was held, that the lien of the first judgment remained in full force, and bound the lands in the hands of such purchaser, as he had not only failed to plead and rely upon the lapse of time in opposition to it; but by acknowledging the judgment to be unsatisfied, thereby admitted the plaintiff's right to have execution; and consequently, the continuance of his lien. (c)

At law where the suit abates by the death of a party within the time allowed for suing out execution, or during the continuance of the lien, it may be revived by *scire facias*, so as thereby to continue the lien from the date of the judgment. And after such an abatement, the plaintiff at law, or his representative, may come in under a creditor's suit in equity, without reviving the suit at law by a *scire facias*, and be allowed the benefit of his lien as against the realty, from the date of the judgment, or as against the personality from the date of the delivery of the *fieri facias* to the sheriff. As, under such circumstances, this court considers him entitled to the benefit of his lien, without requiring him to make himself out to be a judgment creditor by evidence, strictly speaking, and such as he has a right then to proceed upon at law; (d) since that lien which gave him a preference from its date not having been broken or suspended by a presumption of satisfaction or otherwise; the revival at law of the judgment to which it was incident, merely for the purpose of having it established in favour of or against the new parties would be wholly unnecessary, as all such parties, if not then before the court, might come in under such creditors' suit. (e)

According to the English law there is no positive limitation against a bill of revivor, or a *subpœna scire facias* to revive a decree; yet where there had been a lapse of fifteen years, the proceedings were stayed. (f) But in Maryland it would seem to have been long since understood, that there was a similar limitation to the issuing of an execution upon a decree as to that of issuing an execution upon a judgment at law; and that no execution can

(c) *Ridgely v. Gartrell*, 3 H. & McH. 449; Bing. Execu. 161.—(d) *Robinson v. Tonge*, 3 P. Will. 398; *Burroughs v. Elton*, 11 Ves. 36; *Rowe v. Bant*, 1 Dick. 150.—(e) *Drewry v. Thacker*, 3 Swan. 529; *Clarke v. Ormonde*, 4 Cond. Cha. Rep. 54.—(f) *Comber's case*, 1 P. Will. 767.

be now issued upon the one or the other after the lapse of three years from their date without a revival. (g)

After the time has elapsed by which the plaintiff is precluded from at once issuing an execution upon his judgment, he may still, if it be not satisfied, instead of a *scire facias*, have an action of debt upon it; but the institution of such an action, as it is incompatible with, and cannot be prosecuted at the same time, and together with an execution upon the judgment, amounts to a waiver of the lien arising from the right to issue execution; or an admission, that no such lien then exists. (h) There was formerly no positive limitation to an action of debt upon a judgment; but after the lapse of twenty years it would be presumed to have been satisfied, unless the delay could be sufficiently accounted for. (i) But by our act of Assembly the bringing of such an action of debt has been expressly limited to twelve years. (j)

It appears from the proceedings and the testimony taken in support of the claim of *Stone & McWilliams*, that at the August term, 1822, of St. Mary's County Court, they obtained a judgment against *James Walker* and *Jeremiah Booth*, for the before mentioned amount, from which judgment *Walker* and *Booth* appealed; and, after the case had been taken to the Court of Appeals, and placed there for argument, *Jeremiah Booth*, on the 10th November, 1824, died; that afterwards, at June term, 1825, of the Court of Appeals, the judgment of the county court was affirmed; and that a part of the judgment so affirmed had been satisfied by *Walker*, who had since become totally insolvent. There has been here therefore not only a considerable lapse of time since the rendition of the judgment by the county court, but an abatement by the death of *Booth* since the judgment was rendered.

But it has been declared, that no case in the Court of Appeals,

(g) *Barrington v. O'Brien*, 1 Ball & Be. 173; *Matthews' Presum.* 470; *Thomas v. Harvie*, 10 Wheat. 146; *Berrett v. Oliver*, 7 G. & J. 207.

STUMP v. HOPKINS.—On the petition in this case a *ca. sa.* was ordered, on the return of which it was moved to quash the execution, because more than a year had elapsed from the date of the decree before the application for the *ca. sa.*

1806.—*KILTY, Chancellor*.—This objection is such as to cause some doubt, and to require consideration; therefore, the execution must be quashed as having been erroneously issued.—*M. S.*; *Forum Rom.* 192; 1823, ch. 194.

(h) *Selwin*, N. P. 627; 3 *Blac. Com.* 160, note; *Bates v. Lockwood*, 1 T. R. 638; *Holmes v. Wainwright*, 1 Swan. 23; *Sasscer v. Walker*, 5 G. & J. 103.—(i) *Kemys v. Ruscomb*, 2 Atk. 45; *Hales v. Hales*, 1 Rep. Cha. 105; *Winchcomb v. Winchcomb*, 2 Rep. Cha. 101.—(j) 1715, ch. 23, s. 6; *Hammond v. Denton*, 1 H. & McH. 200.

under a rule argument, should abate by the death of either of the parties; and that the court might give judgment as if the party were alive; and the judgment should have the same effect as if it had been rendered in favour of, or against the deceased. (k) According to this law, the lien commencing with the judgment of the county court was stayed, suspended and continued by the appeal; and must be considered as having been finally affirmed by the judgment of the Court of Appeals in favour of *Stone & McWilliams* against *Jeremiah Booth*, as of June, 1825. (l) As the case could not abate after it had reached the Court of Appeals and had been there placed under a rule argument, the plaintiffs could not have been expected or required to revive their judgment until after the Court of Appeals had pronounced its decision. But after that, although the lien then subsisted in full force; because there could then be no *laches* imputed to the plaintiffs, nor then any presumption that their judgment had been satisfied; (m) yet no execution at law could have been sued out against the representatives of *Booth* until the plaintiffs had made them parties to their judgment; which, it seems, has not yet been done.

It is clear, that, since the passage of the act enlarging the time for suing out executions on judgments, (n) there could be no presumption, that this judgment of *Stone & McWilliams* had been satisfied until after the lapse of three years from June, 1825, when it was affirmed by the Court of Appeals; and consequently, their lien remained in full force in March, 1828, when they filed their petition in this case. That petition must, at least in equity, be considered as in all respects equivalent to the suing out of a *scire facias* to revive the judgment against the representatives of *Booth*; and to entitle them to the full benefit of their lien so as to give them a preference in satisfaction; since, under all the circumstances of the case, it would have been utterly nugatory to have proceeded at law, or to have attempted to obtain satisfaction of their claim in any other way. (o) It is then clear that *Stone & McWilliams*, at the time they filed their petition, had a valid and subsisting lien upon this equitable interest of *Booth's*.

Having thus disposed of the objections to the judgment of *Stone & McWilliams*, it now becomes necessary to attend to the claims

(k) 1806, ch. 90, s. 11; 1815, ch. 149, s. 5 and 6; *Green v. Watkins*, 6 Wheat. 261.—(l) *Bac. Abr. tit. Abatement*, F; *Penoyer v. Brace*, 1 *Ld. Raym.* 244.—(m) *Garnon's case*, 5 Co. 88; *Howard v. Pitt*, *Carth.* 236; *S. C.* 1 *Show.* 402.—(n) 1823, ch. 194.—(o) *Robinson v. Tonge*, 3 P. Will. 398; *Burroughs v. Elton*, 11 *Ves.* 36.

and pretensions of the heirs of *Jordan*. They allege and argue, that *Booth*, the purchaser, having been one of the sureties in the bond given by *Edmund Key*, their guardian, could never have obtained a legal title to the real estate bought by him, until the amount claimed by them was fully paid; that he was bound to see to the proper application of the purchase money, and not having done so; and the money he paid to *Key*, their guardian, having been wasted, it was, as to them, no payment; and therefore the equitable lien, held by the court, still subsisted for their benefit, to enable them to enforce the payment of the whole purchase money which has not come to their hands; and further, that they, as bond creditors of *Booth*, have a right now to come here and have their claim tacked to the equitable lien of the court, and satisfied along with it in preference to any other of the creditors of *Booth*.

It will be seen by adverting to the proceedings, that sundry payments which had been made by *Booth*, the purchaser, to *Key*, as the guardian of these then infant heirs of *Richard Jordan*, deceased, were made with their consent expressed after they attained their full age, and were thereupon ratified and confirmed by the orders of the court; and therefore, as to all matters covered by such consent and by the judgment of the court thereupon, it is now entirely too late to have them opened for re-adjudication, in order to let in any claim of which these heirs were then fully apprised, and which they might then have made. They can now sustain no claim in opposition to the past orders of the court, in the passing of which they have not, and cannot allege and shew, that there has been any fraud, surprise, error, or mistake; and consequently their claim must be considered and disposed of entirely in accordance with those past judgments of the court; that is, as being a claim against *Key*, their late guardian, for whose default they may hold *Booth* liable as one of *Key's* sureties in his guardian's bond.

The only cases in which a purchaser is bound to see to the application of the purchase money are where a trust has been raised by deed or will for the sale of an estate for the payment of debts and the like; and the trust so raised is of a defined and limited nature. (p) But such is not the case now before the court. This sale to *Booth* was made under a decree in a creditor's suit. A purchaser under a decree can have no concern with the disposition which the court may make of the purchase money; nor can his

right, as a purchaser, be in any manner affected by any irregularity in the case, or misapplication of the purchase money. When he pays the whole of the stipulated amount he is entitled to an absolute conveyance of the whole right of the parties to the suit, whatever that may be, and is not bound to look to any thing beyond the express terms of his contract with the court, as reported by the trustee employed to make the sale. (q)

Where a mortgagee has made further advances to the mortgagor, and taken his bond, binding himself and his heirs, to secure payment, the mortgagee may tack such bond debt to his mortgage as against the heir or devisee of the mortgagor, who shall not be allowed to redeem without paying the bond as well as the mortgage debt. This, however, is solely a matter of arrangement to prevent circuitry of suits; for in natural justice, the claim has no foundation. But this tacking of the bond debt to the mortgage is never allowed, in any case, to the prejudice of creditors whose claims, as to the bond debt, are of equal degree. (r) Here the heirs of *Jordan* are not mortgagees; but merely have an interest in the equitable lien held by the court for their benefit only so far as there might be a surplus after the payment of all the creditors of *Richard Jordan*, deceased. These heirs of *Jordan* may, it is true, in respect to the guardian's bond by which *Booth* was bound as a surety, be considered as bond creditors of *Booth*. But a mere bond can give them no lien whatever upon the estate of *Booth*, and they certainly cannot be allowed to come here and have their bond debt tacked to the equitable lien of the court, to the prejudice of the judgment and other creditors of *Booth*.

There is therefore, no foundation for these alleged superior claims and pretensions of the heirs of *Richard Jordan*, deceased. They can only stand here as bond creditors against the estate of *Jeremiah Booth*, deceased, and take subject to all prior liens, and *pro rata* with the other creditors of *Booth* in equal degree.

Whereupon it is *Ordered*, that this case be and the same is hereby referred to the auditor with directions to state such account as the nature of the case may require; in which he will consider the claim of *Stone & McWilliams* as founded on a judgment against the late *Jeremiah Booth*, *James Walker* being insolvent, taking date from its rendition in the county court. And the claim

(q) *Bennett v. Hamill*, 2 Scho. & Lefr. 577, 581; *Burke v. Crosbie*, 1 Ball. & Bea. 501; *Lloyd v. Johnes*, 9 Ves. 65; *Curtis v. Price*, 12 Ves. 105.—(r) *Powel Mortg.* 348, 526, 1019.

of *Richard Jordan* and *Lee* and wife as founded on a bond given by *Jeremiah Booth*, his co-obligor *Edmund Key* being insolvent. And it is further *Ordered*, that the said exceptions of the parties, so far as they may be inconsistent with this order, be and they are hereby overruled.

In a report made in obedience to this order, and filed on 4th of February, 1831, the auditor says, that he had again examined the proceedings and stated certain additional claims, lately exhibited, which were numbered from 5 to 9, inclusive. That No. 5, was on a judgment rendered against *James Walker* and *Jeremiah Booth*, on the 8th of August, 1821, prior to the judgment of *Stone & McWilliams'* claim, No. 3. But that the judgment was not under seal; and there was no affidavit of the assignor; it also appeared, from an endorsement on the short copy filed, that the judgment had been enjoined in equity. That No. 6, No. 7, and No. 9, were judgment claims, but were not proved in the usual manner; and were subsequent to the judgment claim, No. 3, which was more than equal to the fund to be distributed. And that he had stated an account applying the balance left unappropriated by his report of the 31st of July, 1829, to the payment of the additional costs, claim No. 5, and a part of the judgment claim of *Stone & McWilliams*, No. 3.

After which, on the 7th of February, 1831, the petitioners *Lee* and wife and *Richard Jordan*, excepted to the allowance made by the auditor in his report and account filed on the 19th of June, 1826, of the said sum of one thousand dollars as a credit to said *Booth* on account of the said purchase money; because, among other reasons, the said payment does not appear to have been authorized by any order of the court. And they further excepted to the allowance of all other items and payments in said account as credits as aforesaid not appearing to have been authorized by the court or any order thereof.

7th February, 1831.—BLAND, Chancellor.—*Ordered*, that this last report of the auditor be and the same is hereby ratified and confirmed; and that the exceptions this day filed be overruled; and the trustee is directed to apply the proceeds accordingly: except as to the claim No. 5; the determination upon which is hereby suspended until the 24th of March next; at any time after which day, the said claim No. 5, may be finally disposed of, on the application of any party interested in, or affected by it.

The case stood over accordingly, after which time, at the instance of the claimants *Stone & McWilliams*, it was again brought before the court.

26th March, 1831.—BLAND, Chancellor.—It appearing from a careful inspection of the voucher of claim No. 5, which was filed on the 27th of December last, that the injunction by which the execution of the judgment might have been, at one time suspended, had been dissolved; and the voucher of that claim having been filed long after the expiration of the time allowed for the creditors to bring in their claims; and the other objections to it, as stated by the auditor, not having been removed, as allowed by the order of the 7th of February last. It is therefore *Ordered*, that the said claim of *Philip Turner*, designated as claim No. 5, be and the same is hereby rejected; and the trustee is directed to apply the proceeds, awarded by the auditor to it, in satisfaction of the said claim of *Stone & McWilliams* designated as No. 3.

From these last orders, of the 18th of January, 7th of February and 26th of March, 1831, the petitioners *Lee* and wife and *Richard Jordan* appealed, and they were at the December term, 1832, of the Court of Appeals, affirmed. *Lee* and wife and *Jordan v. Stone & McWilliams*, 5 G. & J. 1.

MORGAN'S CASE.

On a petition and affidavit, that a certain person is of unsound mind, a writ *De Lunatico Inquirendo* may be issued. A trustee of a lunatic may decline to continue to act as such. No one should be appointed trustee or committee of a lunatic who is not a resident of the state. Where there is a doubt as to the soundness of mind of one who has been declared a lunatic, he should be apprised of the fact, and of the Chancellor's readiness to hear any communication from him or on his behalf. A lunatic's runaway slave, who has been apprehended, may be sold and the proceeds of the sale invested for the benefit of the lunatic.

On the 15th of September, 1806, *John Nubb*, by his petition, stated, that *Charles Morgan*, of Talbot county, a relation of his by marriage, was incapable of managing his affairs, and a lunatic; wherefore he prayed that a writ *De Lunatico Inquirendo* might be issued, &c. To this petition was subjoined an affidavit of two persons stating, that they had known *Morgan* for some time past, and believed him to be a person deprived of his reason. Where-

upon it was *Ordered*, that a writ be issued as prayed, &c. In pursuance of which an inquisition was had on the 10th of October, 1806, and returned and filed on the 3d of November following, in which it was found, that *Charles Morgan* had, for five years then last past, been a person of an unsound mind who did not enjoy any lucid intervals, and was incapable of governing himself or his property; and that he was entitled to a tract of seventy-five acres of land of the annual value of thirty dollars; to three negro slaves; and a bond for the sum of \$100.

19th May, 1807.—KILTY, *Chancellor*.—*John Nabb, Esquire*, of Talbot county appointed trustee. To give bond in the usual form with one or more sureties to be approved by the Chancellor in the penal sum of £1,000.

This trustee gave bond as directed, and returned a schedule of the property received by him. Some time after which he died; and sundry persons by a certificate recommended *William Barwick* as his successor.

4th September, 1810.—KILTY, *Chancellor*.—*Ordered*, that *William Barwick* be and he is hereby appointed trustee for *Charles Morgan* a lunatic; *Provided*, that before he acts as such or takes into his possession any of the property he give bond as directed in the original order.

This trustee gave bond accordingly; and, after some time, informed the Chancellor by letter, that he could not act as trustee any longer.

23d December, 1811.—KILTY, *Chancellor*.—The trustee having declined to act longer in this case; it is *Ordered*, that *James Nabb* be appointed trustee in his place. Bond to be given as the former trustee was directed.

This trustee gave bond as required, and returned several accounts of his receipts and disbursements of the rents and profits of the lunatic's estate; the first of which left a balance of \$200 due to the trustee; the second left no balance either way; the third shewed a balance of \$35 due to the trustee; and the fourth shewed a balance due him of \$45. After which this trustee communicated to the Chancellor his determination to relinquish his trust. And *George W. Nabb* was recommended as his successor.

13th June, 1820.—KILTY, *Chancellor*.—*Ordered*, that *George W. Nabb* be and he is hereby appointed trustee in the place of

James Nabb, resigned. The said trustee to execute a bond with surety as was done by the former trustee, after which a further order will be made.

After this trustee had given bond as required, the former trustee returned a further account shewing a balance due him of \$25. And this trustee filed an account in which he charged himself with an amount of rents and profits received more than equal to the maintenance of the lunatic. This trustee by a letter addressed to the Chancellor declined to act any longer, and recommended *Charles Nabb* as his successor.

19th January, 1824.—*JOHNSON, Chancellor.*—Ordered, that *Charles Nabb*, of Talbot county, be and he is hereby appointed trustee in the place of *George W. Nabb*, resigned. The trustee now appointed to give a bond with surety as was done by the last trustee.

Charles Nabb declined the acceptance of the trust, and recommended *Thomas M. Cooper*, the nearest of kin to the lunatic, as a suitable person to be appointed.

22d May, 1823.—*JOHNSON, Chancellor.*—Ordered, that *Thomas M. Cooper* be and he is hereby appointed trustee in place of *Charles Nabb*, resigned. The trustee at this time appointed to give bond for the performance of the trust as before directed to be given by the former trustee.

It does not appear, that the trustee *Cooper*, ever gave bond as required. The former trustee *George W. Nabb* filed his account from which it appeared, that there was a balance of \$10 due to him.

Charles Morgan, the lunatic, by his petition, filed on the 17th of June, 1829, complained of the mismanagement of the trustee *Cooper*, and of his not having provided him with a comfortable subsistence from the proceeds of his estate, which was amply sufficient for that purpose; and alleged, that although he had been officially found a lunatic some time past; yet he could produce certificates of many respectable persons, who now thought otherwise. Whereupon he prayed, that he might be either restored to the full possession and enjoyment of his property; or that another trustee might be appointed in place of *Cooper*, &c. With this petition there were a number of certificates and letters filed, from respectable citizens of Talbot county, expressing various, different, and opposite opinions as to the then mental condition of *Charles Morgan*.

18th June, 1829.—BLAND, *Chancellor*.—The petition of *Charles Morgan*, together with the opinions in writing of sundry persons, as to his capacity to manage his own affairs, having been submitted, were read and considered.

Charles Morgan himself did not appear, as would seem to have been his intention from what is said in one of the letters filed. But if he had, it is most likely I should not have been better enabled to have ascertained the regularity and strength of his mental faculties by a short personal interview, than from the various opinions which have been thus given to me of him. It is not easy to make up a correct judgment on such a matter. (a) In cases of lunacy a generous equity is to be administered with a parental hand; and yet, the means of meting out common justice is not always within the power of the court for want of correct information as to facts and circumstances. It does not appear, that the court has ever before been informed, that *Thomas M. Cooper* was a resident of the state of Delaware at the time he was appointed trustee. It is clear, that no one should be appointed or continued as the trustee of a lunatic who resides beyond the jurisdiction of the court, and cannot promptly be made amenable to its authority. (b) I have therefore no hesitation in displacing *Cooper*. And I now only deem it necessary to appoint another trustee until the intellectual condition of *Charles Morgan* can be more satisfactorily ascertained. (c)

Whereupon it is *Ordered*, that *Richard Dardin*, of Talbot county, be and he is hereby appointed trustee in the place of the said *Thomas M. Cooper*, to take charge of and have the care, custody, and management of the person and estate of the said *Charles Morgan*, a lunatic. And that the said trustee *Dardin*, apply the interests, rents, issues, and profits, of the said lunatic's estate to his support and maintenance, and render an account thereof accordingly. But before the said *Dardin* acts as trustee, he shall give bond to the state of Maryland, with surety to be approved by the Chancellor, in the penalty of \$3,000, well and truly to discharge his duty as trustee, and to render an account, on oath, of all the property of the said lunatic, with the interest, rents, issues, and profits thereof, once in each year; and as much oftener as may be required; and to deliver the same up, when called upon to do so.

(a) Colegate D. Owings' case, 1 Bland, 370.—(b) *Ex parte* Ord. 4 Cond. Chan. Rep. 44; Logan v. Fairlee, 4 Cond. Chan. Rep. 90.—(c) *Ex parte* Thomas Drayton, 1 Desau. 144.

And it is further *Ordered*, that the said *Thomas M. Cooper* deliver up and transfer all the property, debts, rights, and effects, which may be in his possession or under his control of the said *Charles Morgan*, unto the said trustee *Richard Dardin*; and also render unto this court a true and full account, on oath, of all his proceedings concerning the said lunatic and his estate.

And it is further *Ordered*, that the said trustee *Richard Dardin*, as soon as may be after he has given bond, make out and return to this court, a full and complete inventory, on oath, of the estate, debts, rights, and effects, of the said lunatic which may have come to his hands, and so far as he can ascertain the same.

And it is further *Ordered*, that the said lunatic, or any one on his behalf, may at any time, on petition to this court, have the said *Morgan* discharged from its further custody upon such affidavits as he may think proper to file, taken before any justice of the peace, and made by any physician, or other respectable person, giving such a particular description and opinion of the mental condition of the said *Morgan* as may enable the Chancellor to judge of his ability and capacity to manage his own affairs.

And it is further *Ordered*, that the said trustee immediately make out and deliver to the said *Charles Morgan* a full and exact copy of this order, to the end, that he may be apprised, so far as he thus can be, of the disposition the court has made of himself, and of his estate; and of its willingness to hear and maturely to deliberate upon any application he may hereafter make to it.

The trustee *Dardin* gave bond as required; and, in a few months after, died; upon which *Jesse Scott*, by his petition, stated the fact, and prayed, that he might be appointed trustee to the lunatic.

29th December, 1829.—BLAND, Chancellor.—*Ordered*, that *Jesse Scott* be and he is hereby appointed trustee of the person and estate of *Charles Morgan*, a lunatic, in the place of *Richard Dardin*, deceased, as prayed; but before he acts as such he shall give bond as required by the order of the 18th of June last. And it is further *Ordered*, that the said *Jesse Scott* be and is hereby invested with all the authority conferred by that order, and is required to comply with all the directions therein contained.

This trustee gave bond as required, and made a report of his receipts and disbursements of the rents and profits of the lunatic's estate. And afterwards by his petition, filed on the 8th of April,

1831, stated, that the lunatic's negro man slave named *Harry*, had been for some time out of his possession as a runaway; that he had caused him to be arrested in the city of Baltimore, and brought back and lodged in Talbot county jail for safe keeping; and that if taken out of jail he would again run away and be wholly lost. Whereupon he prayed, that he might be authorized to sell the said slave for the benefit of the lunatic.

9th April, 1831.—BLAND, *Chancellor*.—*Ordered*, that the said trustee *Jesse Scott*, be and he is hereby authorized and required to make sale of the negro slave *Harry*, either by advertising him for sale at public auction; or by a private sale; or on a credit, not exceeding ninety days; or for ready money, as he may deem most advantageous for the lunatic. And if the trustee shall sell the negro on a credit, he shall take bond with surety, to be approved by him, from the purchaser to secure the payment of the purchase money with interest from the day of sale. And it is further *Ordered*, that the trustee be and he is hereby authorized and required, as soon as may be, to invest the proceeds of the sale, in stock of the Farmers' Bank of Maryland, in the name of and for the benefit of the said lunatic. And that the trustee report to this court, on oath, a full account of all his proceedings in relation to the said sale and investment; and also an account of his proceedings as trustee, as required by the orders of the 18th of June, and the 29th of December, of the year 1829. (*d*)

Some time after this the lunatic died, and no further proceedings respecting his estate appear to have been had here.

AUSTIN v. COCHRAN.

A creditor's suit does not abate by the death of a plaintiff or any creditor who may have come in, if there be then a plaintiff or creditor competent to prosecute the suit.—But a creditor's suit will abate by the death of a defendant heir or devisee, whether there be any surplus of the proceeds of the sale to be returned to him or not.

THIS was a creditor's bill filed on the 18th of March, 1820, in Baltimore County Court, by *Edward Austin*, *Edward Austin the younger*, *Anthony Austin*, and *John Austin*, partners trading under

the firm of *George Austin & Co.*, against *Deborah Cochran*, *William S. Cochran*, *Thomas L. Emory*, and *William G. McClure*. The bill states, that a partnership in trade had existed and been carried on between the late *William Cochran* and the late *John G. Comegys*, in the city of Baltimore, under the firm of *William Cochran & Comegys*; which firm had, in the course of their dealings, become largely indebted to the plaintiffs; which debt then remained due and unpaid; that *William Cochran* died leaving a considerable real and personal estate, which, by his will, he devised to his wife the defendant *Deborah*, and to his infant son the defendant *William S. Cochran*; and appointed *Deborah*, *John G. Comegys*, and *Samuel Hollingsworth*, his executors; that *Deborah* and *Comegys* had qualified as his executors, and *Hollingsworth* had refused to accept the appointment; that *John G. Comegys*, the surviving partner, had taken into his possession all the estate and effects of the firm; and after some time died, having by his will appointed the defendants *Emory* and *McClure* his executors, who qualified accordingly as such; that the property and estate of the firm which passed into the hands of the surviving partner *Comegys*, were entirely or nearly absorbed by other claims against it; and that the personal estate of the late *William Cochran* was insufficient to pay his debts. Whereupon it was prayed, that the real estate of the late *William Cochran* might be sold for the satisfaction of his creditors.

On the 11th of November, 1820, the defendants *Emory* and *McClure* put in their answer, in which they admit the claim of the plaintiffs, and the deficiency of the effects of the firm of *William Cochran & Comegys*, to satisfy the claims against it. The death of *Deborah Cochran* was suggested, and *Thomas L. Emory* was admitted as a defendant in her stead. After which two other creditors filed their petition praying to be allowed to come in as plaintiffs; and, on the 8th of May, 1826, they were permitted to be made parties as prayed. On the 9th of May, 1826, the defendant *Emory*, as administrator *de bonis non* of *William Cochran*, answered, and admitted the claim of the plaintiffs. And, on the same day, the infant defendant *William S. Cochran* put in his answer, by his guardian *ad litem*, in which he admits the claim of the plaintiffs, and assents to the sale of the real estate of his ancestor and devisor.

The parties filed an agreement on the 10th of May, 1826, in which they say, 'It is agreed, that a decree shall pass in this cause

for the sale of the property mentioned in the proceedings therein, with a stay of execution on said decree until the first day of June, 1827, for the payment of the claims legally due by the said *William Cochran* and *John G. Comegys*, the said creditors, by their solicitors agreeing to release the said *William S. Cochran* of and from all claims for rents received by him or his guardian, from the house and lot in Market street, in the city of Baltimore, in the proceedings mentioned, where the said *William Cochran* formerly resided, up to the said first day of June, 1827.' In conformity with this agreement, a decree was passed, on the same day, directing the real estate of the late *William Cochran* to be sold; and it was sold accordingly, and the sale finally ratified on the 1st of February, 1828.

After which the proceedings were removed under the act of 1824, ch. 196, and filed here on the 29th of December, 1830. And during the consideration of the case it was verbally intimated, that the defendant *William S. Cochran* was in fact then dead.

5th May, 1831.—BLAND, Chancellor.—A creditor's suit is regulated by principles, in relation to abatement, in some respects, different from other suits. It is a general rule, that in all cases where a plaintiff or a defendant dies whose entire interest is inseparably mingled with that of the other parties, and yet does not devolve upon any of them, the suit abates; and no further proceedings can be had until it has been regularly revived. (a) But, in a creditor's suit, all the other creditors of the same debtor may come in and associate themselves, as plaintiffs, with the one by whom it was instituted; and from the time such creditors file the vouchers of their claims, or are otherwise admitted as co-plaintiffs, the suit may be prosecuted by all or any of them as well as by the originally suing plaintiff. They are all entitled to the same privileges as plaintiffs; and each one is allowed to take the same stand as against the defendant. And consequently, if he by whom the suit was commenced, or any one who has afterwards come in, and taken the position of a plaintiff, dies, the suit does not abate, if there be, at the time, any other unsatisfied creditor standing as a plaintiff; because, although the interest of the deceased does not survive to any of the other parties; yet there are other plaintiffs to whom all the rights, privileges and benefits of the suit do survive, and who are competent to call upon the court for its decree; and

(a) *Boddy v. Kent*, 1 Meriv. 361.

who must, therefore, be permitted to support their own interests, and to prosecute the suit for themselves, leaving the representatives of the deceased creditors to come in and renew the prosecution of their claims as they may think proper. (b)

In ordinary cases, at common law, when a creditor dies pending a suit which he had instituted against his debtor, it devolves, as a duty, upon his executor or administrator to see, that it is seasonably revived and prosecuted with effect; and so too in this court. But in creditors' suits it would be attended with unnecessary; and, in many respects, insufferable delay and expense, to consider the whole suit as abated by the death of any one of the multitude of creditors who may have been associated together as plaintiffs; for there are not unfrequently instances in this court of creditors' suits in which there have been more than an hundred creditors admitted to come in and claim a right to participate in the distribution of the deceased debtor's estate: and therefore, where a creditor's bill has been filed by only one creditor, and he dies, after other creditors have come in, as the whole costs are here first paid out of the debtor's estate, the suit does not necessarily abate; but may be sustained and prosecuted by any creditor who has come in, as well as by any one of the surviving plaintiffs, where the bill has been filed by several; and the representatives of the deceased plaintiff or creditor, by merely filing the legal testimonials of their being clothed with that character, may be permitted to take his place as renewed parties without filing a bill of revivor. (c)

But although the suit cannot be suffered to abate, or to be even unreasonably delayed; because of the occasional dropping off, by death, or the payment of the claims of some of the troop of creditor plaintiffs, who, having a common interest, have therefore been permitted, or required to come in and make common cause in the pursuit of their claims; yet as to the defendant debtor, or his representatives, who hold the fund upon which the charge is made, the case is very different. It is obviously the interest of such defendants to have every unsound claim rejected; because, after all the creditors are satisfied, they are entitled to the surplus. And

(b) 1 Eq. Ca. Abr. 3, p. 7; *Fallowes v. Williamson*, 11 Ves. 310; *Boddy v. Kent*, 1 Meriv. 361; *Burney v. Morgan*, 1 Cond. Chan. Rep. 183; *Houlditch v. Donegall*, 1 Cond. Chan. Rep. 249; *Mittf. Plea*. 59; 1 Fowl. Exch. Pra. 68; *Calvert on Parties*, 104, 107.—(c) *Boddy v. Kent*, 1 Meriv. 361; *Dixon v. Wyatt*, 4 Mad. 393; *Burney v. Morgan*, 1 Cond. Chan. Rep. 183; *Houlditch v. Donegall*, 1 Cond. Chan. Rep. 249; *Handford v. Storie*, 1 Cond. Chan. Rep. 414.

even where there may not be a sufficiency to satisfy all the creditors; it is a duty which such defendants owe to the just creditors of their testator or intestate ancestor or deviser, as well as to themselves, to make all proper disclosures, and to assist in having a fair distribution made by excluding all unfounded claims, so that those only which are clearly valid may obtain the full dividend to which they are entitled.

In this case, therefore, if it be true that *William S. Cochran* is now dead, it is evident that no further proceedings can be had until his legal representatives have been made parties.

Whereupon it is *Ordered*, that this case stand over until further order.

After which the plaintiffs, by their petition, stated, that *William S. Cochran* made his will, by which he appointed *William H. Freeman* his executor, and died. Whereupon they prayed, that a *subpœna* might issue, &c. And it appearing from the proceedings, that the real estate which descended to the said *William S. Cochran*, had been converted into personalty; it was thereupon *Ordered*, that a *subpœna scire facias* issue against the said *Freeman* as prayed; which being returned summoned, the suit was ordered to stand revived in all respects against him; and was thereafter prosecuted to a conclusion.

SIMMONS v. TONGUE.

On the petition of a widow in a creditor's suit, a commission may be issued to assign her dower.—Another person may be admitted as a purchaser in place of him who was reported as such.—After the sale has been ratified, and the purchase money has become due, the purchaser, and his sureties, may be ordered to pay; and, on their failing to do so, the land may be re-sold at the risk of the purchaser.

Where it appears, in a creditor's suit, that there is any personal estate left, the executor or administrator should be decreed to account.—A decree for a sale establishes the whole or a part of the plaintiff's claim.—Where a creditor neglects, on being actually notified, to come in, under a creditor's suit, against the estate of the deceased as his principal debtor, such debtor's sureties will be discharged.—A discount in bar, if not distinctly specified and admitted, must be shewn and established by him who is to benefit by it, or it will be rejected.—Where there has been a partnership, the partnership debts must be first paid out of the joint estate; and the separate debts first paid out of the separate estate.

Where it appears doubtful upon the face of the voucher, the claimant must shew whether the deceased was principal or surety.—Where the deceased was bound only as a surety, the principal and co-surety, if there be one, must be shewn to

be insolvent.—The original bond, bill, or note, should be produced; or, if lost, an authenticated copy, or other proof.—No claim can be admitted which did not exist, as such, against the deceased.—Claims withdrawn, to be re-stated, considered in the nature of an amended bill.—Where creditors come in so late as to require the distribution to be re-cast, they must defray the expense of such re-statement.

THIS was a creditor's bill filed on the 15th of July, 1826, by *William Simmons, Richard Simmons, James Owens, and John Sellman*, against *Benjamin Tongue, Elizabeth Tongue, Sarah Tongue, Thomas I. Hall, John N. Watkins, and William Ennis*. The bill states, that the late *Thomas Tongue*, at the time of his death, was indebted to the plaintiff *William Simmons* by notes and open account to the amount of \$448 17; to the plaintiff *Richard Simmons* by note in the sum of \$500; to the plaintiff *James Owens* in the sum of \$304 15 on an open account; and to the plaintiff *John Sellman* on open account and a note in the sum of \$356 59. That the plaintiffs *Owens* and *Sellman* had endorsed for the late *Thomas Tongue* several notes to the amount of \$5,000 and upwards, which had been negotiated at The Farmers Bank of Maryland, and for which they were then liable; that the plaintiff *Sellman* had become surety for the late *Thomas Tongue*, in a testamentary bond given by him as executor of his father, from whose estate there was still due by the late *Thomas Tongue* to his sister, the sum of \$4,000, for which this plaintiff was liable; that in the month of January, 1826, *Thomas Tongue* died intestate, leaving the defendants *Benjamin Tongue, Elizabeth Tongue, Sarah Tongue* and *Thomas Tongue*, his infant children and heirs at law; that administration had been granted to the defendant *Thomas I. Hall*; that the personal estate of the intestate would not be sufficient to pay his debts; that he had died seised of several parcels of land; and, in his life-time, had purchased a tract of land, sold under a decree of this court to satisfy a mortgage which had been assigned to him and the defendant *Thomas I. Hall*; that the sale of this parcel of land was made by the defendant *John N. Watkins*, as trustee in a suit in which this defendant *William Ennis* was the defendant, and had been finally ratified; and therefore this land was liable in this case to the extent of the late *Thomas Tongue's* interest as assignee of a part of the mortgage debt, after satisfying all the costs and prior claims in that suit. Whereupon the bill prayed that the real estate might be sold, &c.

On the 6th of September, 1826, the defendant *Hall* put in his answer, in which he admitted, that the plaintiffs were creditors of

his intestate as stated; that the plaintiff *Owens* was liable as endorser for \$1,500; and that the plaintiff *Sellman* was liable as endorser for \$1,000; but that he knew nothing of their being in any other way liable as endorsers; that the plaintiff *Sellman* was responsible for the sum of \$3,806, as surety for his intestate on a testamentary bond; and that the personal estate of his intestate was insufficient for the payment of his debts.

The defendants *Watkins* and *Ennis*, on the 9th of October, 1826, filed their separate answers, in which they admitted the truth of what was set forth in the bill in relation to the sale made under the decree of this court, by *Watkins* as trustee; they declared that they had no knowledge of any other matter stated in the bill.

The infant defendants *Elizabeth*, *Sarah* and *Thomas*, put in their answer by their guardian *ad litem*, on the 18th of October, 1826, in which they admitted the allegations of the bill; and on the 6th of November following, the other infant defendant *Benjamin*, answered in like manner and to the same effect.

On the 18th of October, 1826, *Ann* the widow of *Thomas Tongue*, filed her petition, in which she stated that in consequence of the insolvent condition in which her husband died, she, with her infant children, had been left in a very destitute situation; that a very short time before the death of her husband, she had become entitled, by the death of her father, to negroes and other personal property, amounting in value to between three and four thousand dollars; all of which had been since applied in satisfaction of her husband's debts; that *Robert Garner* had agreed to serve as trustee in this case for the sale of her husband's real estate, and to give her the commission which might be allowed to him. Upon which she prayed, that he might be appointed trustee, &c. With this petition was filed the recommendation of *Garner* as trustee by many of the creditors. And there were also filed recommendations from many other creditors, that the defendant *Thomas I. Hall* should be appointed trustee.

7th November, 1826.—BLAND, Chancellor.—Decreed, that the real estate of the late *Thomas Tongue* be sold for the payment of his debts; that *Robert Garner* be appointed trustee to make the sale, &c. that one-third of the purchase money be paid in cash, one-third in six months, and the residue in twelve months from the day of sale, with interest, &c. and that the trustee give notice to the creditors of *Thomas Tongue*, deceased, to file the

vouchers of their claims in the Chancery office within four months from the day of sale.

Ann Tongue the widow, on the 24th of January, 1827, filed her petition, in which she stated, that she was entitled to dower in the real estate directed to be sold; and thereupon prayed, that her dower might be assigned to her and that a commission might be issued to the persons therein named for that purpose. On the same day it was *Ordered*, that a commission issue as prayed.

By an order of the 6th of March, 1827, passed on the application of sundry creditors, the terms of sale specified in the decree of the 7th of November, were altered so as to direct that one-third of the purchase money should be paid in six months, one other third in twelve months, and the residue in eighteen months from the day of sale with interest.

A commission having been issued as prayed, to assign to the widow her dower; the commissioners, on the 18th of April, 1827, made a return setting forth in what manner they had assigned dower to the widow as directed. But it does not appear, that any confirmation of the return, or that a decree for the dower so assigned was ever passed. (a)

The trustee *Garner*, on the 19th of April, 1827, made a general report of the sales he had made on the 15th of January, and on the 31st of March previous, amounting to \$9,661 16½. Upon which it was *Ordered*, that they be ratified, unless cause shewn to the contrary, on or before the 19th of July following.

Robert Welsh of *Ben*, on the 14th of June, 1827, filed his petition on oath, in which he stated, that he had purchased of the trustee *Garner* a part of the real estate of the late *Thomas Tongue*, subject to the dower of his widow; but that although the dower had before been assigned to her, he was not then informed in what manner it had been laid out; this petitioner had since understood, that in regard to quantity and quality she had, had assigned to her at least one moiety of the land; that in that part laid off to her, was included the dwelling-house of her late husband, and all those other buildings, without the use of which the tract of land could not be advantageously used and cultivated; that since the assignment of dower and sale, the trustee had entered upon the part

(a) *Mildred v. Neil*, 2 Bland, 354, note; *Ewing v. Ennalls*, 2 Bland, 356, note; *Watkins v. Worthington*, 2 Bland, 512; *Chambers v. Davenport*, 12 Cond. Chan. Rep. 241.

allotted to the widow, claiming to be her agent or tenant; and was then cultivating it in a very injurious and destructive manner; that a certain *Gassaway Simmons*, with the connivance of the trustee, had taken possession of about nineteen acres of the land which he had professed to sell to this petitioner. Whereupon he prayed that the sale to him might not be confirmed.

15th June, 1827.—BLAND, Chancellor.—Ordered, that the matter of this petition be heard on the 13th day of July next; that the parties be authorized to take testimony in relation to the matter thereof, before any justice of the peace on giving three days notice as usual; and that the final ratification of the sale be postponed until that day: *Provided*, that a copy of this order together with a copy of the petition be served on the trustee and the widow on or before the 27th instant.

The widow *Ann Tongue* and the trustee *Garner*, on the 27th of July, 1827, put in their separate answers on oath to the petition of *Welch*, in which they denied specially and particularly the material matters of fact set forth by *Welch*. And the depositions of several witnesses were taken and returned under this order.

Robert Welch of *Ben*, by his petition, filed on the 15th of January, 1828, stated, that he had understood, that the trustee *Garner* had lately sold the tract of land of which he, *Welsh*, had been, as stated in his former petition, the purchaser, to *John Collinson*; that the trustee had thereby indicated an intention to abandon his defence as set forth in his answer of the 27th of July last. Whereupon the petitioner prayed, that the trustee might be ordered to report, &c.

17th January, 1828.—BLAND, Chancellor.—Ordered, that the trustee *Garner* forthwith make a full report of his proceedings as prayed; and that the matter of the said petition be heard on the 15th of February next; *Provided*, that a copy of this order together with a copy of the said petition be served on the said *Garner* and on *Ann Tongue*, on or before the 1st of February next.

The trustee *Garner*, on the 26th of April, 1828, reported on oath, that since the sale made to *Robert Welch* of *Ben*, and the report thereof, he, the trustee, at the solicitation of *John Collinson*, and with the consent of *Welch*, had agreed to substitute *Collinson* as purchaser for *Welch*, with the approbation of the Chancellor. To this report *Welch* filed his assent, and the matter was submitted.

2d July, 1828.—BLAND, Chancellor.—Ordered, that the sales made and reported by the trustee *Robert Garner* be absolutely ratified, no cause having been shewn, although notice had been given as required. That *John Collinson* be considered as the purchaser, and with his consent as standing in the place of the said *Robert Welch* of Ben; as appears by the report of the said trustee, and by the assent of the said *Welch*.

William Simmons, Richard Simmons, James Owens, John Sellman, The Farmers Bank of Maryland, and William Fowle and Henry Dangerfield, trading under the firm of *William Fowle & Co.* creditors of the late *Thomas Tongue*, by their petition, filed on the 2d of July, 1828, stated, that the greater part of the purchase money on the sale made by the trustee *Garner* had then become due; but had not been brought into court or accounted for. Whereupon they prayed, that the trustee might be ordered to report, to bring into court the money or bonds, &c.

2d July, 1828.—BLAND, Chancellor.—Ordered, that the trustee *Robert Garner* forthwith make a particular report of his proceedings on oath; and also bring into this court the money collected and the bonds taken by him, as prayed: *Provided*, that a copy of this order together with a copy of the said petition be served on the said trustee on or before the first day of August next.

The trustee having failed to comply with this order, on application of the petitioners, an attachment was ordered against him on the 4th of September, 1828; and, on the 11th following, he made a report on oath, in which he stated, that having but recently been informed of the final ratification of the sales, he could not sooner inform the court of the non-compliance of the purchasers; and further, that he had received a part of the purchase money, an account of which he exhibited, &c.

William Fowle and Henry Dangerfield, trading under the firm of *William Fowle & Co.*, *The Farmers Bank of Maryland, William Simmons, Richard Simmons, James Owens and John Sellman*, creditors of the late *Thomas Tongue*, with the trustee *Garner*, by their petition stated, that a part of the real estate had been sold to *William H. Hall, junior*, who, to secure the payment of the purchase money, had on the day of sale given bond, with *William H. Hall* and *Thomas I. Hall*, as his sureties; and had paid a part of the purchase money, leaving a balance then due. That another

part of the estate had been sold to *Robert H. McPherson*, who had paid no part of the purchase money, the whole of which was then due. Whereupon they prayed that those purchasers might be ordered to pay, &c.

15th September, 1828.—BLAND, Chancellor.—Ordered, that *William H. Hall, junior, William H. Hall* and *Thomas I. Hall*, bring into this court the sum of \$264 72, with interest thereon from the 1st of November, 1827, until brought in. And that *Robert H. McPherson* also bring into this court the sum of \$780 50, with interest from the 15th of January, 1827, until brought in, or shew cause to the contrary on or before the 1st of November next; *Provided*, that a copy of this petition and order be served on the said *William H. Hall, junior, William H. Hall, Thomas I. Hall* and *Robert H. McPherson*, before the 15th of October next.

The same petitioners afterwards filed another petition, in which they stated, that the purchaser *John Collinson* had, to secure the payment of the purchase money, given his bond with *James Tongue* and *Gideon G. Tongue* as his sureties; and that the purchase money had not been paid since it became due. Upon which they prayed that payment might be ordered, &c.

2d October, 1828.—BLAND, Chancellor.—Ordered, that *John Collinson, James Tongue*, and *Gideon B. Tongue*, bring into this court the sum of \$8,575 67, with interest from the 13th of May, 1827, being the balance of the purchase money now due, or shew good cause to the contrary, on or before the first of November next; *Provided*, that a copy of this petition and order be served on the said *John, James*, and *Gideon*, before the 15th day of the present month.

To this petition *John, James*, and *Gideon* answered, shewing for cause, that the estate of the late *Thomas Tongue* was largely indebted to *John Collinson*, in satisfaction of which he claimed at least a dividend of the proceeds of sale, and was willing and ready to bring in the balance; to ascertain which they prayed, that the auditor might be directed to state an account. And the solicitor for the petitioners agreed, that an account should be first stated as prayed.

8th November, 1828.—BLAND, Chancellor.—The petition of *William Simmons* and others against *William H. Hall, junior*, and others, having been submitted; and it appearing that copies

had been served as required; and they having failed to bring in the several sums of money therein mentioned, or to shew cause to the contrary, the proceedings were read and considered.

Whereupon it is *Decreed*, that *Robert Garner*, the trustee appointed by the original decree, proceed to make sale of the house and lot in the village of Tracy's Landing, heretofore sold by him to *Robert H. McPherson*, for the payment of the purchase money due thereon; and that the said sale be at the risk of the said *Robert H. McPherson*. And it is further *Decreed*, that the said trustee proceed to make sale of the parcel of land heretofore sold by him to *William H. Hall, junior*, for the payment of the balance of the purchase money due thereon; and that the said sale be at the risk of the said *William H. Hall, junior*. And it is further *Decreed*, that the sales made under this order be for cash, payable on the day of sale, or on the ratification thereof. In all other respects the said trustee is directed to conform to the original decree, according to which he hath given bond for the faithful performance of the trust reposed in him by that or any future decree or order in the premises.

Ann Tongue now moved on her petition, filed on the 18th of October, 1826, that the commissions of the trustee *Garner* should be adjusted and awarded to her as therein set forth and agreed.

13th April, 1829.—BLAND, Chancellor.—*Ordered*, that *Ann Tongue* be allowed the sum of \$319 83, out of the proceeds of the sales of the real estate of her deceased husband *Thomas Tongue*, the same being the amount of commissions allowed to the trustee on the proceeds of the said sales. (b) And the trustee *Robert Garner* is hereby allowed the sum of \$105 for expenses attending the sale and survey of the said estate.

The trustee *Garner*, on the 23d of April, 1829, reported, that in pursuance of the decree of the 8th of November, he had made sale of that part of the real estate of which *Robert H. McPherson* had been the purchaser to *James Tongue*, for \$401. And that *William H. Hall, junior*, who had been the other purchaser of the other part, had paid into court the whole amount of the purchase money due from him. Upon which it was *Ordered*, that this sale be ratified unless cause shewn to the contrary before the 23d day of June then next.

On the 30th of April, 1829, the auditor filed a report, in which he stated that he had examined all the proceedings and had stated all the claims filed against the estate of *Thomas Tongue*, deceased; and also an account between the said estate and the trustee, in which the proceeds of sale were applied to the trustee's expenses, the allowance to the widow in lieu of the trustee's commissions, the costs of suit, and dividends on all the claims which had been then exhibited. That claims No. 4, 7, 8, 21, 50, 52, 61, 72, 86, 87, 92, 101, 114, 115, 117, and 124, were not proved agreeably to the act of 1798, ch. 101. That the affidavits annexed to claims No. 5, 41, 56, 58, 86, 91, and 119, admit claims in bar, the amount of which, however, were not stated. That the defendants had filed a copy of the list of debts due to the deceased which was returned by his administrator to the Orphans Court; and from that list it appeared that there were accounts which ought to be discounted in bar of claims No. 1, 2, 3, 4, 8, 22, 29, 31, 35, 39, 42, 43, 49, 57, 87 and 101. That claim No. 47 appeared to be for cash paid the deceased in discharge of a note given by the present claimant to the deceased; and was, therefore, clearly inadmissible. That claim No. 52 was the joint note of the deceased, and one *T. T. McPherson*. A moiety only of which should be allowed, unless evidence should be furnished of the insolvency of *McPherson*; or that he was a surety for the deceased. That claim No. 90 was the single bill of the deceased and *John Collinson*, and liable to a similar objection. That claims No. 67, 68, 69 and 70, were for the deceased's drafts on *B. D. & R. Mullikin*, and accepted by them. No proof had been exhibited of the insolvency of the acceptors. It was also objected, that the original acceptances ought to be produced. That claims No. 108, 109, 110, 111, 112 and 113, were for the deceased's drafts on *N. C. Dare*, and accepted by him. There was no proof of the acceptor's insolvency. That claim No. 91 was for the deceased's draft on *J. Sparrow* in favour of *Gassaway Pindall*, which was paid by the acceptor. The acceptance was legal evidence that the drawer had funds in the hands of the acceptor; and no proof to the contrary had been exhibited. That claim No. 123 accrued since the death of the deceased. That claim No. 127 was originally a partnership debt. It was now filed, but not proved as a separate debt. That claims No. 128, 129, 130, 131, 132 and 136, were debts due from the firm of *Tongue & McPherson*, and of *T. T. McPherson & Co.*, of which the deceased was a partner; and

should be postponed to the claims of his separate creditors. And that claim No. 135 was for a balance due to the firm of *Tongue & McPherson*; it was not proved. The auditor also reported, that *James Murray* had filed an assignment for the sum of \$40, part of the dividends on claims No. 1 and 2. And that since the statement of these accounts an additional claim had been filed and stated as No. 137. As the dividend on it was small, \$6 65, the auditor suggested that it should be paid out of the interest received, or to be received by the trustee.

16th July, 1829.—BLAND, *Chancellor*.—Ordered, that the foregoing statement of the auditor, as to the commissions, expenses, and costs of this suit alone, as therein stated, be confirmed; and the trustee is directed to apply the proceeds accordingly.

After which, on the 15th of March, 1831, the auditor filed another report, in which he said, that at the instance of the solicitor of the complainants he had again examined the proceedings. That fourteen additional claims had been filed, which were stated and numbered from 138 to 151 inclusive. From the copy of the list of debts due to *Thomas Tongue*, deceased, mentioned in the report of the 30th of April, 1829, it appeared, that there were accounts in bar of claims No. 138, 139, 140, 141, and 147. That claim No. 143 was on a note of *Tongue & McPherson*, and should be postponed to the separate creditors of *Tongue*. That the claim No. 21 of *John Collinson* as administrator *de bonis non* of *Thomas Tongue*, senior, had been withdrawn, and in lieu thereof claims had been filed by *John Collinson* and *Ann* his wife, *Harriet Waters*, and *Elizabeth Allen*, as legatees of said *Tongue*, which were stated and numbered 152, 153, and 154. But from the aforesaid copy of the list of debts due to the deceased, it appeared that there were accounts in bar of claims No. 153 and 154.

That claim No. 7 had been withdrawn, and another claim filed, which was stated as No. 155, and is correctly proved. That the account in bar of claim No. 2 was allowed and the objection thereto removed. That claim No. 4 was not proved. The proof offered was a paper purporting to be a copy of a bill obligatory, alleged to have been executed by the deceased, accompanied by the affidavit of the claimant, that the original obligation was lost. It was not usual to require proof of the sealing and delivery of a bill or bond where the bond itself was filed, and was subject to inspection. But in the absence of the original, the auditor was

inclined to think, that some proof, other than the oath of the claimant, should be offered of its due execution.

That claims No. 52, 108, 109, 110, 111, 112, 113, 115, and 119, were proved. That claim No. 86 was formally proved, except that the amount of the account in bar which was admitted to exist by the affidavit, was not yet stated. That claim No. 87 was the claim of one of the complainants which the auditor thought should be considered as fully proved. That claim No. 101 was formally proved; but from the copy of the list of debts due to the deceased, before alluded to, it appeared, that there was an account in bar which should be credited.

Proof had been filed of the insolvency of *B. D. & R. Mullikin*, as was required to sustain claims No. 67, 69 and 70; but the original acceptances had not yet been produced. Additional proofs had been offered in support of claim No. 127. And it now appeared, that sundry assignments had been made by *Tongue & McPherson*, on account thereof, which should be credited. The auditor had not re-stated the claim, because he was not satisfied that it ought to be allowed against the estate of the deceased partner. Additional proof had also been offered to sustain claims No. 114, 115, and 117, from which he had re-stated the same as No. 156, 157, and 158; No. 157 and 158 were proved, but No. 156 was not proved.

William Fowle & Co. as claimants No. 127, on the 2d of May, 1831, filed their exceptions to the auditor's reports. 1. Because the evidence as exhibited and filed establishes, in behalf of these complainants' claim, an original liability of *Thomas Tongue*, as partner of *Thomas T. McPherson*. 2. Because it establishes a distinct original liability of *Thomas Tongue* to these exceptants, independent of the partnership of *Tongue & McPherson*. And 3. Because it establishes a collateral liability of *Thomas Tongue* to these exceptants, which operates as beneficially in favour of these exceptants as an original undertaking.

On the 28th of May, 1831, *Joseph Allen* filed an exception to the auditor's report, because he had rejected his, *Allen's* claim No. 4. And on the same day *Mary A. Allen*, *John Collinson*, *Gideon G. Tongue*, *Rezin Estep*, *Harriet Waters*, and *Elizabeth Allen*, excepted to the auditor's report, because he had not allowed their claims No. 5, 22, 29, 35, 153, and 154.

6th June, 1831.—BLAND, Chancellor.—'This case standing ready for hearing on the several reports of the auditor, and the

exceptions thereto, the solicitors were heard for and against several of the claims; and the proceedings read and considered.

It appears from the auditor's statements, that he makes frequent reference to certain dividends which some of the creditors had obtained from the personal estate; and it is also stated by the auditor, that from the list, filed by the defendants, of the debts due to the late *Thomas Tongue*, it appears, that there are accounts which are relied on as discounts in bar of many of the claims. These circumstances very strongly shew the propriety and utility of passing a decree to account against the executor or administrator in all cases where it is alleged and shewn, that there is any personal estate which had been or might be distributed in satisfaction of those creditors who then claimed payment from the proceeds of the realty.

Where there has been, or is then no administration, because of there being no assets, there is no personal representative of the deceased debtor to bring before the court for any purpose. And where the personal estate had been confessedly altogether taken up in making entire satisfaction of some claims, without any proportional distribution among any, it would be idle and unnecessary to call on the executor or administrator to account. But where, as in this instance, it appears, that there had been a distribution of the personalty among the creditors in partial payments; or where there are some personal assets still to be administered, there should be a decree to account against the executor or administrator for his own protection, to save him from being unjustly charged by any creditor whose claim had not been passed upon by this court; and also for the benefit of creditors to force the executor or administrator to account for the whole of the assets which had come to his hands; and to prevent any one creditor from obtaining more than a due proportion of satisfaction from the whole estate of the deceased; and also to relieve the heirs or devisees from every portion of the burthen which should be borne by the personal estate as the natural fund for the payment of debts. For these reasons the whole estate, personal as well as real, should be brought before the court, by a decree to account against the executor or administrator, which in this case has been very improperly omitted, as well as by a decree for a sale of the realty.

These two reports of the auditor have described one hundred and fifty-one claims which have been presented here against the estate of *Thomas Tongue*, deceased, the proceeds of which the

court is now about to distribute. This great multitude of claims are shewn to be susceptible of being placed in several classes; and if they had been so arranged by the auditor, the subjects would have been put into better order, and the necessary investigation thus, in some respects, facilitated. The claims of the originally suing creditors should always be placed by the auditor first in his statement, as having been passed upon by the decree which directed the sale, and immediately after and in connection with all such claims as the original plaintiffs have, as in this instance, indicated in their bill, that they stand liable for as sureties. And then the rest of the claims should be grouped together in successive classes, according to their nature; as separate debts, partnership debts, joint debts, debts due by judgment, bond, note, &c. But this arrangement has seldom or ever been made, and cannot be deemed necessary, or allowed to affect the interests of the parties, however desirable it may be as a means of facilitating the inquiries of the Chancellor.

The claims of the originally suing creditors, so far as they have been distinctly set forth in their bill; either as claims in their own right, or in a representative capacity, as executors, &c. are always considered as having been finally decided upon and allowed by the decree directing a sale; since it is clear, that no such decree should be passed unless it had been shewn that there was some debt then due. And upon this ground the decree for a sale, although it may be silent as to the validity of such claims, necessarily establishes them to their whole amount, unless some one, or a part of some one of them, has been rejected altogether; or expressly reserved for further directions, in common with the claims of other creditors who may come in after the decree. (c)

This direction applies to the claim of the plaintiff *Richard Simmons*, designated as No. 87, which having been tacitly decided upon by the decree of the 7th of November, 1826, must be allowed, notwithstanding the doubt intimated by the auditor.

The plaintiffs *Owens* and *Sellman* state, that they, as endorsers of notes for the late *Thomas Tongue*, may be made to pay as such; and in that way, their claims may be largely increased. And the plaintiff *Sellman* alleges, that he is liable to a considerable amount as surety of the late *Thomas Tongue*, on a testamentary bond; so that, by such liability, there is a probability of his claim being

(c) *Strike's case*, 1 Bland, 68; *Hammond v. Hammond*, 2 Bland, 359.

considerably augmented. Those creditors to whom these plaintiffs are bound as sureties, are under an obligation to bring in their claims, and offer them for a dividend in this case. If they fail to do so after having had actual notice of this suit, and of the call on them to bring in their claims, they can obtain no satisfaction from the estate of the deceased, after the whole of it has been actually distributed among his creditors; and, consequently, having thus negligently suffered themselves to be excluded from any recourse against the estate of their principal debtor to the prejudice of these plaintiffs, they, as his sureties, will be discharged; or if, after coming in, they fail to establish their claims, so as to obtain a dividend, then these plaintiffs, will, upon like principles, be discharged; or, if they come in and establish their claims and obtain a dividend, then these plaintiffs can only be bound for the balance. To enable these plaintiffs to avail themselves of a defence, upon one or other of these grounds, against these claims, to which they have referred in their bill, it should be shewn to the auditor and distinctly set forth by him in his statement of those claims, that they are those very liabilities, specified in the bill, against which these plaintiffs ask an indemnity, or a discharge. But, it appears, though not as clearly as it ought, that those creditors, to whom these plaintiffs were so bound as endorsers or sureties, have filed their claims in this case, and that they now stand, as designated in the auditor's reports for adjudication. (*d*)

The auditor reports as to some claims, that the defendants have filed a copy of the list of debts due to this intestate, from which it appears, that there are accounts which ought to be discounted in bar; and as to some other claims, that the affidavits annexed to them admit claims in bar, the amount of which, however, is not specified.

The recouper of the common law, the set-off of the English statute law, and the discounts in bar of our acts of Assembly are, in effect and substance, the same. They refer merely to the opposing of one unconnected just claim against another, in the same suit, to prevent circuitry of action; or the bringing of cross suits. The defendant, or he who, under a creditor's bill, files a distinct account in bar of any claim, thereby assumes the position of a plaintiff, and undertakes, by asserting, in that respect, the affirmative of the matter in litigation, to establish the claim he avers to

(*d*) *Arthur v. The Attorney-General*, 2 Bland, 245, note.

be due, and insists on having allowed as a discount in bar. And, consequently, it lays upon him to shew how much, if any, is due on the claim so offered as a discount in bar, in like manner as if he had instituted an original action for the recovery of the debt shewn by the account filed in bar, unconnected with any other claim whatever. (e)

With regard to those cases where *some* discount in bar has been admitted in the affidavit of the claimant himself; such an admission only amounts to an indefinite acknowledgment, that *some such* opposing claim *may* exist, which he, the deponent, is willing to meet and adjust; (f) but it cannot be received as a concession, that his own authenticated claim has been entirely satisfied by one which it does not lay upon him to ascertain; and which he who holds it, apparently estimates at so low a value as to neglect to bring forward and establish. The affidavit prescribed by the act of Assembly in relation to intestates' estates, and which act is taken as a guide by this court in cases of this sort, requires the deponent to swear, that he had received no satisfaction, 'except what, *if any*, is credited;' (g) but these affidavits credit nothing; and the deponents leave us distinctly to understand, that it was not in their power to give credit for any particular amount as a discount from their claim. And therefore, as in an action of account, if the defendant refuses to account, the plaintiff shall recover according to the value mentioned in the declaration; (h) so here, if the party fails or neglects to shew the amount of the discount to which he is entitled, the whole claim must be allowed.

I am therefore of opinion, that in all these cases, as well where an account in bar has been filed by the defendants, and it has not been regularly authenticated according to the course of the court, as where a discount in bar has been referred to in the affidavit of the claimant himself without specifying the amount, it must be disregarded, and the whole amount of the creditor's claim must be allowed, as if nothing whatever had been said about any discount in bar. These directions apply first to claims No. 1, 3, 4, 8, 22, 29, 31, 35, 39, 42, 43, 49, 57, 87, 101, 138, 139, 140, 141, 147, 153 and 154; and in the next place to claims No. 41, 56, 58, 86,

(e) *Strike's case*, 1 Bland, 79; *Babington on Set-off*, 3.—(f) *Kennett v. Millbank*, 21 Com. Law Rep. 213; *Pattison v. Frazier*, 2 Bland, 381, note.—(g) 1798, ch. 101, sub ch. 9.—(h) Com. Dig. tit. *Accompt*, E. 15; *Babington on Set-off*, 3; *Poulter v. Cornwall*, 1 Salk. 9; *Godfrey v. Saunders*, 3 Wils. 117.

91 and 119; as to all which, the doubts or objections of the auditor, in these respects, must be overruled.

In the administration of the assets of a deceased debtor by this court, where he had been, in his life-time, a member of a partnership, it is now definitively established, that the partnership creditors must be first satisfied out of the joint funds; and the separate creditors first paid out of the separate estate. (i) Consequently, until the partnership creditors have been thus fully satisfied, the separate creditors can make no claim upon the partnership effects; nor until the separate creditors are satisfied, can the partnership creditors be permitted to take any thing from the separate estate. The debtor, in such cases, has two distinct capacities, the one a natural, the other a conventional capacity; (j) in the one case his capacity is that of a separate individual, in the other it is that of a partner according to the contract among an association of individuals. The creditors of these several capacities are as distinct as the estates so held, in respect of which the credit may be presumed to have been given: and the property of each is applied first to the satisfaction of the creditors of each; because a different course would be, in effect, to apply the property of one man to the payment of the debts of another. Where a partnership exists nothing can be said properly to belong to each member of it, but his dividend of the surplus after all the partnership debts are paid; so, on the other hand, that alone can be considered as properly the separate estate of an individual which remains, after all his separate debts have been paid. Each of those capacities of the same person is an implied surety for the other; or, in other words, partners are mutually sureties to the creditors for the share of each other; (k) but then it would be unequal and unjust to extend this suretyship, or implied liability beyond the surplus, or the clear estate belonging to each capacity; because the creditors of the one capacity hold it directly bound, and those of the other have only an eventual and secondary claim upon the same capacity after those to whom it was directly bound have been fully satisfied. (l)

But as the assets now to be administered are the proceeds of the separate estate of the late *Thomas Tongue*, it is clear, that all

(i) *McCulloh v. Dashiell*, 1 H. & G. 97.—(j) *Salmon v. The Hamborough Company*, 1 Cha. Ca. 204; *Coppen v. Coppen*, 2 P. Will. 295; S. C. Sel. Ca. Chan. 30.—(k) *Ex parte Watson*, 4 Mad. 477.—(l) *Ex parte Elton*, 3 Ves. 240; *Gray v. Chiswell*, 9 Ves. 118; *Collyer Partn.* 337.

these claims now made against them, which were debts due from the several firms of *Tongue & McPherson*, and from *T. T. McPherson & Co.* of which the late *Thomas Tongue* was a partner, must be postponed in favour of the claims due from the late *Thomas Tongue* in his separate capacity. It is alleged, that this separate estate will be wholly insufficient to pay the debts due from the late *Thomas Tongue* alone; if so, then this postponement will amount to a total rejection of those claims against the several partnerships, as there will be no surplus of this separate estate applicable to them. This direction comprehends claim No. 127, 128, 129, 130, 131, 132, 136 and 143, as to all which the auditor's objections are deemed valid.

It has been urged, as regards claim No. 127, that although it was, in truth, originally only a claim against the firm of *Tongue & McPherson*; yet, that this intestate had, in his life-time, assumed upon himself the payment of it; and had thus made it his own separate debt. It is true, that any one member of a partnership may, by promise or contract, take upon himself the payment of a partnership debt; or the partnership may, in like manner, bind itself to pay a separate debt of any one of its members. But, in this instance, there is no sufficient evidence of any such promise or contract, whereby the late *Thomas Tongue* had made himself separately liable to pay this debt, due from the firm of *Tongue & McPherson*; and therefore the objection against it has not been removed.

Another class of claims are those made by the holders of some accepted bills of exchange. Where a bill has been accepted, the acceptor is considered as the principal debtor, and primarily liable for the whole amount to all others, the drawer, endorsers, and holder. The acceptance is *prima facie* evidence against the acceptor of his having in his hands effects of the drawer; and, therefore, if the fact be not so, it lies upon the acceptor to establish the fact to enable him to recover from the drawer. (m) Hence all these claims founded on bills of exchange drawn by the late *Thomas Tongue*, which had been accepted, must be regarded as claims for which he was not the principal debtor; unless it should be shewn that the acceptor paid it without having in his hands effects of the drawer. And as the drawer and endorsers stand in the relation to each other of a series of sureties, it must be shewn, that each one who stood before, and was, therefore, principal

(m) Selwyn N. P. 351.

debtor as to him against whose estate the claim is made, is insolvent; or, according to the rule of this court, the claim will be excluded from any participation in the distribution of the estate upon which it is made. (*n*)

The auditor says, that the original acceptances ought to be produced. By this I understand it to be objected, that the original bills of exchange themselves have not been produced. In an action at law upon a bill of exchange, on the general issue being pleaded, it is necessary to produce the original bill itself, or to prove that it has been lost, before any evidence can be offered of its contents. (*o*) And even if, in such action, there is a judgment by default; although it is not necessary, on executing the writ of inquiry, to prove the contract; yet the original bill itself must be produced. (*p*) But, in the distribution of the real assets, this court is governed by the rules prescribed for the authentication of claims in the analogous distribution of the personal assets. As to which it is declared, by the act in relation to the administration of the personal estates of deceased persons, that in case of a specialty, bond, note, or protested bill of exchange, the voucher shall be the instrument of writing itself, or a proved copy, in case it be lost, with a certificate of the oath, &c. (*q*)

These directions apply to claims No. 67, 108, 109, 110, 111, 112 and 113, which must be allowed, because the acceptors are shewn to be insolvent; to claims No. 69 and 70, which must be rejected, because the original bills have not been produced or shewn to be lost; and to claim No. 91, which must be rejected, because it is made by an acceptor who has not shewn that he had in his hands at the time no effects of the drawer.

According to the rule of this court, where the deceased, with others, appears to have been jointly bound for the payment of the claim, the creditor must explain the apparent ambiguity, or he will be altogether excluded. He must shew that the deceased was the principal debtor, in which case he will be permitted to come in for the whole amount; or that the deceased was a co-obligor, in which case the creditor will be allowed to claim no more than half; unless he also shews that the other obligor is insolvent; or if the deceased was only a surety, then the creditor must shew that the principal is insolvent. (*r*)

(*n*) *Watkins v. Worthington*, 2 Bland, 509.—(*o*) *Selwyn N. P.* 408.—(*p*) *Tidd's Prac.* 523.—(*q*) 1798, ch. 101, sub ch. 9, s. 4.—(*r*) *Watkins v. Worthington*, 2 Bland, 509.

This direction applies to claim No. 52, which must be rejected, because it has not been shewn whether the late *Thomas Tongue* was principal or surety; and to claim No. 90, which must be allowed, because the necessary explanation has been given.

I am of opinion that the affidavit of the claimant himself is sufficient proof of the loss of the original bill obligatory on which the claim No. 4 is founded; and that the production of a copy, so proved, as in this instance, with the other testimonials thereto annexed, amount to a sufficient authentication of the claim, according to the act of Assembly. (s) The claim No. 4 must therefore be allowed.

It is an established rule, that no claim can be allowed which did not exist, as such, against the deceased himself, in his life-time. Upon this ground claim No. 123 must be rejected; and claim No. 47, as stated by the auditor, is also clearly inadmissible.

It appears from the auditor's second report, that sundry claims have been withdrawn and re-stated. It is a rule in suits of this kind, that every creditor who comes in after the institution of the suit, on petition, or by filing the voucher of his claim, is allowed to take the position of a plaintiff as fully, as regards his interest, as if he alone had filed the bill. And therefore, upon the ground that a plaintiff may be allowed to amend his bill; so a creditor may be permitted to withdraw his claim for the purpose of having it re-stated in a more correct form; but then, upon the principles in relation to amending a bill, according to which the amended bill is a virtual admission of the informality or invalidity of the plaintiff's claim, as set forth in the original bill, so the re-statement must be considered as an implied abandonment of the claim in the form in which it was first stated. (t) This direction applies to the claims re-stated as from No. 152 to 158 inclusive, which now stand for adjudication only as they have been so re-stated.

In cases of this kind, it is the course of the court to allow a reasonable time after the auditor has reported a statement of the claims, for the creditors and parties to make a general scrutiny into the proposed distribution and its several parts; to take exceptions; to remove objections; or to produce further proof in support of their respective claims and pretensions. This reasonable time is, however, always estimated with reference to the time limited for creditors to bring in their claims, and to the time when the audi-

(s) 1798, ch. 101, sub ch. 9, s. 4.—(t) *Lindsay v. Lynch*, 2 Scho. & Lefr. 9.

tor has filed his first statement of the claims; for although as in this instance, so far as it can be done without delay or prejudice to the creditors and parties in the case, any other claimants will be allowed to come in, who file the vouchers of their claims before the court has actually parted with the fund by a final distribution of it; yet they can have no claims upon the special indulgence of the court; and it will not postpone the distribution to give them time to remove objections, or to collect further proof in relation to their claims. (*u*) The circumstance of such a multitude of creditors having been gathered together, as in this instance, affords strong ground for asking all the indulgence which the nature of the case can authorize; but here there has been an allowance of time which must be admitted to have been sufficiently liberal for every purpose.

With regard to the second statement reported by the auditor. It is in general true as declared by the act of Assembly, that the expense of every statement of an account must be borne by him who desires it; (*w*) but in a creditor's suit the expense of the auditor's statements are borne, in general, by the estate; yet if any new and additional accounts are asked for, the expense of stating them must be defrayed exclusively by those creditors who by their tardiness in coming in have rendered such new or additional statements necessary. (*x*)

These directions apply to all the claims which have been filed since the auditor made his first report, and for whose special benefit the second statement was made; from the aggregate amount of whose dividends the expense of making it must be deducted. And also to all such claims as are not now sufficiently authenticated; which must be finally rejected.

Whereupon it is *Ordered*, that this case be, and the same is hereby referred to the auditor, with directions to state an account accordingly, &c.

In obedience to this order the auditor, on the 29th of December, 1831, stated and reported a final account as directed; which was, on the 9th of January, 1832, confirmed, and the proceeds directed to be applied accordingly, with a due proportion of interest.

(*u*) *Hammond v. Hammond*, 2 Bland, 364; *Kent v. O'Hara*, 7 G. & J. 212.—
(*w*) 1785, ch. 72, s. 17.—(*x*) *Hammond v. Hammond*, 2 Bland, 364.

THE WHARF CASE.

The city collector of wharfage may be directed to keep a separate account of the wharfage for the use of certain wharves until the right to them can be determined. The nature of a public port.—In all public ports there are rights affecting commerce, internal government, and private property, by which the title to, and use of a wharf therein must be controlled.—No wharfage can be allowed and collected which contravenes any congressional regulation of commerce, or the free intercourse, and equal rights secured by the federal constitution.—Anchorage or wharfage may be charged for the use of any place held as mere private property to which vessels may come.—A wharf in a public port is a kind of highway, for the use of which, after it has been once dedicated to the use of the public, no toll can be charged, unless expressly allowed by the General Assembly.—Wharfage where allowed must be reasonable; and when once fixed, cannot be enhanced. The court can pronounce no decree prejudicial to any public right appearing upon the record.—Where each of the litigating parties claims a right to demand wharfage for the use of a public wharf, for the use of which no toll can be legally demanded, they must, both of them, be perpetually enjoined, for the benefit of the public, from collecting wharfage.

THIS bill was filed in August, 1806, by *Cumberland Dugan* and *Thomas McElderry* against *The Mayor and City Council of Baltimore*. The bill itself with almost all the other papers in the case having been lost, a copy of the original bill and answer were, by consent, received in their stead.

It was stated in the bill, that the plaintiffs had, with the consent of the predecessors of the present defendants, made a great length of wharf extending through a considerable portion of that part of Baltimore called Market space; that, as the makers thereof, a right had accrued to them to demand and receive from all vessels lying at or goods landed upon those wharves, a reasonable wharfage; but that they had been prevented from collecting it by these defendants who had, under a pretext of right, taken it to themselves in exclusion of the plaintiffs. Whereupon they prayed, that, until this court should decree who were entitled to receive the wharfage, a receiver might be appointed who should thereafter account for the same; that the defendants should account; and that these plaintiffs might have such other relief as was suited to the nature of their case.

This bill appears to have been sworn to by the plaintiffs, and the following extract was found in the note-book of the then Chancellor.

1806.—KILTY, *Chancellor*.—The plaintiffs claimed certain wharves in the city of Baltimore, and the object was to have the

wharfage at those wharves held separate to be accounted for and paid over as should be ultimately determined by the court who is entitled to the wharfage. But, if this point is to be decided, it must be after a decision at law upon the right; and it does not appear that any action has been, or is intended to be brought for the purpose of trying the right; and the title of the plaintiffs does not appear sufficiently clear and strong. The bill in this case was altered; and an order passed appointing the collector of the city of Baltimore as receiver, with power to pay over to *The Mayor*, &c. and to keep an account, &c.

After which the plaintiff *McElderry* died, and another suit was instituted in this court by the plaintiff *Dugan* and the heirs of *McElderry* against these defendants; and the cases having been brought on to be heard, it was agreed, on the 29th of April, 1831, that in the place of the copy, which had been shortly before received, a new bill should be filed, as an original bill, in lieu of the first one; and that the answer to the first bill should be filed and considered as an answer thereto.

In this new bill, filed on the 11th of May, 1837, it is stated, that by the act of 1784, ch. 62, all that parcel of ground in Baltimore, now commonly called Market space, extending from Baltimore street south, parallel with Gay street, of the width of one hundred and fifty feet to Water street, with the privilege of extending the same to the channel, became vested in the then commissioners of Baltimore town, to hold for the purpose of erecting a market-house thereon; and for the use of the then town, in like manner as if they had been constituted a body politic; that in the year 1794, the common tide flowed within this space up to and over Water street; that this plaintiff *Dugan* being seised in fee simple of the ground on the west side of Market space, extending from the north side of Pratt street to the water; and the plaintiff *McElderry* being seised in fee simple of the ground on the east side of Market space, extending from the north side of Pratt street to the water, they, on the 10th of February, 1794, made the following proposition to the then commissioners of Baltimore town,

‘We, the subscribers, request your permission for making a canal and wharf at our expense, in the Market space from the south side of Pratt street to the channel or port-warden’s line; the canal to be eighty feet wide, and the streets on each side the same to be thirty-five feet wide; the said canal, wharf, and streets

to be made public for the use of the inhabitants, under the laws and regulations of your board; and the whole of the same to be relinquished up to the commissioners whenever the same, or any part thereof may be wanted for market-houses.'

The commissioners took this proposition into consideration, and agreed to it upon the following terms and conditions.

'The commissioners of Baltimore town, having considered the above application, have no objection to *Mr. Thomas McElderry* and *Mr. Cumberland Dugan* filling up the space of one hundred and fifty feet wide, on a line with the present Market space, from Water street as far as a line drawn from the south side of Pratt street shall intersect or cross the said space; and, after filling up the said space, the commissioners have no objection to their making a canal from the said line of intersection to the channel of sixty feet wide, with wharves and a street on each side of said canal of forty-five feet wide. But with this express declaration, that the privilege of filling up said canal, and of the whole space of one hundred and fifty feet wide be fully reserved to the said commissioners, and their successors for the use of the said town, as granted by the act of Assembly, of November session, 1784, ch. 62, entitled, an act for establishing new markets, &c. And also on the express condition, that the said canal, wharves and streets on each side of the said canal be a common highway, and free for the public use, and subject to such regulations as the commissioners and their successors shall from time to time establish. And on this further express condition, that the said *McElderry* and *Dugan* extend Pratt street through their two lots of ground on each side of Market space, and leave Pratt street of the width of sixty feet through their said lots forever as a street for the use of the public.'

The bill further states, that under this authority these plaintiffs proceeded immediately to fill up the specified space; that they filled up and made fast land of the whole of this ground, called Market space, extending into the water, from Water street to the south side of Pratt street, a distance of three hundred feet; and from Pratt street to the channel, they made a canal and wharves as specified, extending further into the water, a distance of one thousand feet; and fully completed the whole according to the terms of their contract in the years 1795 and 1796; that the expense of the work was borne by each of these plaintiffs to the extent of the grounds held by each, thereby giving to each, as the

result of his separate burthen, a distinct right to all the benefits arising from or incident to his separate estate, as a right, privilege and interest to be held in severalty, and not as joint tenants or tenants in common.

The bill further states, that by virtue of this contract with these plaintiffs, and of their compliance therewith, a right accrued to each of them to demand and receive wharfage for any vessel which should lie at, or property which should be landed upon the wharves made by them respectively; which right will continue to belong to each of them until the reserved privilege of filling up the canal, and the whole space shall be exercised; which has not yet been done; that so soon as the work was completed these plaintiffs severally exercised their right to charge wharfage; and continued to receive it, without molestation, from the year 1795 until some time in the year 1799; that after these defendants, as a body politic, created by the act of 1796, ch. 68, had succeeded to the rights of the commissioners of Baltimore town, they took upon themselves to collect wharfage on those wharves, and have collected a large amount, and altogether prevented these plaintiffs from collecting any thing on that account. Whereupon these plaintiffs prayed, that they might have an account of the wharfage so illegally received by the defendants; that they might be quieted in their rights, and have such other relief as the nature of their case might require.

In the copy of the answer, made by *The Mayor and City Council of Baltimore*, to the original bill, which seems to have been filed in April, 1807, and which it had been agreed should be received as an answer to this new bill, it was admitted, that the land called Market space was vested in the commissioners of Baltimore town; that the plaintiffs were the owners of the grounds immediately adjacent; that they entered into the contract with the commissioners; that they accordingly filled up the space and made the canal and wharves as stated; which, however, they did not finally complete until some time in the year 1797. And it was further admitted, that these defendants, having succeeded to the rights of the commissioners of Baltimore town, and being the sole owners of the wharves at the head and sides of the canal, have collected, as they were legally warranted in doing, a large amount of money for wharfage from various persons for the use of those wharves. These defendants deny the right of the plaintiffs to collect wharfage, the claim to which they never made until the

exhibition of their bill; and these defendants aver, that, although it may be, that they have expended large sums of money in complying with their contract; yet that the filling up of the ground, and making the canal, has very considerably increased the value of the property belonging to them. These defendants aver, that the wharves, made as described, were always considered as public wharves belonging to the city of Baltimore; and, as such, wharfage was collected for the use of them, in like manner as for the use of other public wharves; and they aver, that the plaintiffs had collected the wharfage on those wharves, as commissioners appointed by and for the city, up to the time of filing their bill.

On the 1st of June, 1815, another bill was filed by *Cumberland Dugan* and the widow and heirs of *Thomas McElderry*, deceased, against *The Mayor and City Council of Baltimore*. In this bill the plaintiffs, after stating the circumstances in relation to the making of the wharves in Market space, as set forth in the first bill, allege, that the defendants had been prohibited by the act of 1813, ch. 118, from collecting wharfage for the use of any public wharf; and yet had imposed wharfage for the use of the wharves made by these plaintiffs, and had collected a large amount to the exclusion of these plaintiffs, who alone had the right to the wharfage for the use of those wharves. Wherefore they prayed for an injunction, and for general relief. This bill was sworn to by only two of the plaintiffs.

12th June, 1815.—KILTY, *Chancellor*.—The bill for an injunction in this case has been for some time under consideration. On account of the nature of the dispute, and the caution that is necessary in interfering with the legislative acts of an incorporated town. But where such a corporate body frames its acts in opposition to a law of the state on the subject matter, the persons aggrieved are entitled to the aid of this court, and its restraining power cannot with justice be refused.

The Chancellor is of opinion, that the part of the ordinance of March 25th, 1815, charging rates on the articles, therein enumerated, landed on any public wharf, is a palpable evasion of the act of Assembly, 1813, ch. 118; attempting, by a seeming adherence to the letter, to contravene the intention of that law, as plainly appears by the proviso in that section of the ordinance, as well as from a consideration of the manner in which wharves are used by landing goods for the purpose of passing them over, or passing over goods, which must be previously landed. In supposing *The*

Mayor and City Council to have the right to make such an ordinance, it could not lawfully be evaded by passing over goods on planks, skids, or even in drays or carts, so as not to touch or be landed on the wharves.

The ordinance of March 21st, 1814, does not appear to be contrary to the prohibition contained in the act of Assembly of 1813, ch. 118, inasmuch as the wharfage on vessels lying at the public wharves is not mentioned in the latter, and the rates or duties are different in their kind.

On the first part of the bill respecting the rights of the parties no further opinion is expressed than as to the ostensible right of the complainants, which is sufficient to sustain the application for an injunction.

It is therefore *Ordered*, that an injunction be issued prohibiting *The Mayor and City Council*, their officers, agents, and servants from collecting any rates or wharfage, or other tax, charge, or duty in virtue of the first part of the second section of the ordinance of March 25th, 1815, in the bill mentioned and referred to, by which part of the said ordinance, rates were directed to be charged and collected on certain articles landed on any public wharf, that is to say, on the public wharves in the bill mentioned, made by *Thomas McElderry*, deceased, and *Cumberland Dugan*.

The defendants on the 1st of March, 1830, put in their answer to this last bill, in which they admit the truth of all that is said in relation to the making of the wharves; but deny, that the plaintiffs have any title to the ground so filled up by them, or any right to collect wharfage on the wharves they had so made. These defendants aver, that the act of 1813, ch. 118, does not apply to wharves of the description of these; but only to those which are properly public and free wharves; that these wharves are exclusively the property of the corporation, public only for the use of the inhabitants; that since the service of the injunction on these defendants, they had entered into an agreement with the plaintiff *Dugan*, according to which they have continued to collect wharfage on the west side of the canal; and that the other plaintiffs have, for a long time, ceased to consider themselves interested in this cause.

On the 1st of March, 1830, *The Mayor and City Council of Baltimore*, filed their bill here against *Cumberland Dugan*, in which they set forth all the circumstances as admitted or averred

by them in their answers to the two previous bills against them ; and they stated, that they had, by an ordinance of the 3d of April, 1825, established a rate of tonnage duties demandable of all vessels for lying at any of the public wharves, which they had collected accordingly until hindered and prevented by the defendant, who had, under a pretended right that those duties belonged to him, proceeded to enforce the payment thereof from sundry masters of vessels to a very large amount of money. Whereupon they prayed for an injunction ; that a receiver might be appointed and for general relief. This bill was certified under the seal of the corporation to be true ; and was also sworn to by the harbour-master of the city.

1st March, 1830.—BLAND, Chancellor.—*Ordered*, that the register issue writs of *subpœna* and injunction as prayed by the foregoing bill of complaint. And it is further *Ordered*, that the harbour-master, or other officer, who now is, or hereafter may be appointed by the said plaintiffs to collect the wharfage or tonnage on their behalf on the west side of the said canal or dock in the said bill mentioned, be and he is hereby authorized and directed to continue to collect, receive, account for, and pay over the same according to the directions, authority, and power vested in him by the said plaintiffs. And he is hereby directed and required to make out and keep a separate and distinct account of the moneys so collected and received by him ; and to make return thereof to this court on oath when required, to the end, that the same may be retained or paid according as the right thereto shall be made to appear. (a)

To this bill the defendant put in his answer, on the 17th of July, 1830, in which he admitted all that was set forth in relation to the formation of the wharves, the passing of the ordinances ; and the plaintiffs pretending to have a well-founded claim ; but he denied the right of the plaintiffs to make such collections ; and averred, that their doing so was in violation of his previously vested rights ; that he, as the owner of a lot of ground, binding on the tide-water, and on Market space, had legally extended the fast land of his lot, along Market space into the water by filling it up as far as the line established by the port wardens ; and thereby had acquired a complete legal title to the land thus gained from

the tide, and being so entitled to it, all the appurtenant and incidental benefits and advantages thereof accrued to him as its owner; that having, under his contract with the commissioners of Baltimore town, at an enormous expense filled up the grounds and made the wharves in that part of Market space binding on his lot so extended, a right accrued to him in consideration thereof to demand and receive wharfage on those wharves, of which he could not be deprived by these plaintiffs so long as they permitted the canal and wharves to remain.

The plaintiffs having put in a general replication to this answer, a commission was issued and testimony taken and returned, from which it appeared, that at times wharfage had been collected by *Dugan*, and at other times by the city authorities. After the return of the commission with the testimony, the parties filed the following agreement in relation to these three cases.

‘The above bills being cross bills and concerning the same subject matter, it is agreed, that they be all set down for final hearing together; and that the testimony taken or admitted in either case be considered and received as testimony in all of the above cases. That the agreement and compromise with the *McElderrys* made by *The Mayor and City Council* be filed as evidence in the cases; and that further proof after a decree is passed in these cases may be taken by either party before the auditor in order to shew the amount of wharfage received by either party on the wharfage in question.’

13th June, 1831.—BLAND, *Chancellor*.—These cases standing ready for hearing, and the solicitors of the parties having been fully heard, the cases were, by consent, permitted to stand over with leave to amend the pleadings, which having been made, they were submitted without further argument, whereupon the proceedings were read and considered.

This case might have been as well brought before the court in one as by all three of these bills, since they all alike present the same questions, whether the right to demand and receive wharfage upon these wharves belongs exclusively to *The Mayor and City Council of Baltimore*; or to *Cumberland Dugan*? I shall therefore consolidate the cases and dismiss them as to the heirs of *Thomas McElderry*, deceased, who seem, by their neglect, and by the compromise of the city with some of them, and with others who claim under them, or their ancestor, to have abandoned the case; thus leaving the controversy to be decided between the *City of Baltimore* and *Dugan* alone.

The argument was confined to a consideration of the acts of Assembly, the contract of the 10th of February, 1794, and the city ordinances; but the case involves interests of a much wider range; it is one which requires to be investigated not only in relation to the immediate rights of these parties; but as to the manner in which it affects the course of commerce in a great public seaport; and as it regards the uses which those who resort to that port have a right to make of those wharves. The public as well as these parties, therefore, have a deep concern in the questions now to be determined. (b)

A wharf, like a road, may certainly be made on private property; and the one or the other may be as exclusively the property of an individual as his house, or any other portion of his separate estate. A wharf is a building which is always an encroachment on navigable water; because, unless its boundary wall were to extend beyond high water mark, vessels could not approach and lay at it. (c) But these are open wharves in a great public seaport; they are parcel of a public place dedicated to commerce; a place to which all have a right to resort, subject to certain legal regulations. A wharf of this description must always be viewed as a part of the port in which it is situated; it cannot be considered as a thing unconnected with the port itself; because it is subject to the law of the port; and, as is admitted in this instance, the claim of wharfage, who ever may be allowed to profit by it, must be controlled by that law. (d)

A port, in common sea phrase, may be said to be any safe station for ships; but, in law, it is described to be a place for arriving and lading and unlading of ships in a manner prescribed by law; and near to which is a city or town for the accommodation of mariners and the securing and vending of merchandise. So that in this sense a public port is a complex subject, consisting of somewhat that is natural, as a convenient access from the sea, a safe situation against winds, and a shore upon which vessels may well unlade; something that is artificial, as keys, wharves and warehouses; and something that is civil, as privileges and regulations given to it by the government. A public port often includes more than the bare place where ships lade or unlade; it is some-

(b) *Attorney-General v. Burrige*, 6 Exch. Rep. 356; 1 Fowl. Exch. Pra. 257.—
 (c) *Buszard v. Capel*, 13 Com. Law Rep. 379.—(d) *Attorney-General v. Parmeter*, 6 Exch. Rep. 373.

times extended many miles, including several places as members of the port; designating one as a port of entry, and another as a port of delivery. And this is the case in England as well as in this country. (*e*)

The public ports are considered as the great gates of the republic, through which all its foreign intercourse by sea is conducted; and, consequently, they can only be established; and must, in some respects, be regulated by that department of the government to which has been delegated the care of its foreign concerns. In England the power to establish ports is one of the prerogatives of the king; (*f*) and by the charter of Maryland a similar prerogative was given to the Lord Proprietary, which he always claimed accordingly. (*g*) But, as all the regulations necessary for the government of ports could not be established by the exercise of such a prerogative alone, several attempts were made by the General Assembly of the province, as well when the government was in the hands of the Lord Proprietary, as when it was held by the English monarch, to establish and regulate ports; almost all of which failed; because, as it would seem, of the nature of the country, and the peculiar manner in which its trade was then carried on. All the then settlements were within very short distances of one or other of the navigable branches of the Chesapeake; and and as tobacco was the chief, or almost only commodity of exportation, which instead of being gathered, as at present, in great masses, at the principal ports, was, after being packed in hogsheads, rolled to the nearest point of a navigable river, to a *landing*, or to a *rolling house*, along rolling roads, as they were then called, which were opened and established for the purpose, and so shipped from such places. (*h*)

(*e*) Harg. Law Tracts, 46; The Mayor of Hull v. Horner, Cowp. 107; The Dock Company v. Browne, 22 Com. Law Rep. 23; 1706, ch. 14; 1707, ch. 16, s. 6 and 10; 1784, ch. 79, s. 32; Acts Cong. 31 July, 1789, ch. 5; 2 March, 1799, ch. 128.—(*f*) Hale *de jure Maris* and *de Portibus*, 36, 51, 54, 60, 73; 1 Blac. Com. 263; Ball v. Herbert, 3 T. R. 261; Blundell v. Catterall, 7 Com. Law Rep. 91.—(*g*) Chart. Maryl. s. 10; 2 Boz. His. Maryl. 574, 623, 633, 644.—(*h*) 1683, ch. 5; 1696, ch. 24, s. 8; 1706, ch. 14; 1707, ch. 16; 1745, ch. 14; Chal. Pol. An. 367, 380. From these circumstances, both in Maryland and Virginia, the public warehouses for the inspection of tobacco were, before the revolution, often called Rolling Houses —(1763, ch. 18, s. 36 and 37; 3 Virg. Stat. 394; 4 Virg. Stat. 32.) And even to this day, in Virginia, hogsheads of tobacco are rolled from considerable distances in the interior to the warehouses in Petersburg and Manchester. It is said, that in England, originally Custom Houses were instituted as places for the inspection and safe keeping of merchandise, or as Custody Houses; (Gilbert Court of Exchequer, 214;) like those Rolling Houses of our country.

It is obvious, however, that the legal establishment and regulation of all ports, to the extent to which the regulation of marine commerce, and the collection of revenue from it, have been delegated to the government of the Union, must necessarily fall within the scope of its authority, as incident to those powers; for, without the power to confine such trade to certain specified ports, it would be difficult or impossible to collect duties on the tonnage of ships or the importation of merchandise. Upon these principles, therefore, all the public ports of the United States, since the establishment of the federal government, have been described, and, in a great measure, regulated, as such, under its authority. (*i*)

In all public ports there are three kinds of rights, the distinct nature of which, owing to the peculiar form of our government, it becomes more necessary to attend to here than in England. There are, first, public rights, affecting commerce in general, or those in relation to war and foreign intercourse; secondly, public rights involving the powers of the internal government of the Republic; and lastly, private rights, such as the ownership of the soil, or any peculiar franchise.

It is declared by the federal constitution, that 'no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another;' that 'no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;' and that 'no state shall, without the consent of Congress, lay any duty of tonnage.' (*j*)

These rules being fundamental cannot be evaded in any manner whatever; no preference can be given by requiring the payment of tolls or wharfage of any ships or goods, coming from other states of the Union, not demandable on those of this state; nor can duties or tonnage of any kind be exacted of ships or goods coming into our ports from any other of the United States, or from any foreign country, without the consent of Congress. And although it had been found expedient to collect in the port of Baltimore, and in many others of the ports of this Union, as in England, a small duty of tonnage, or port duty, to be appropriated to the sole purpose of clearing the port itself of all obstructions, and keeping it in good navigable order, and for repairing the public

(*i*) *Gibbons v. Ogden*, 9 Wheat. 193; *Wilson v. The Black Bird Creek Marsh Company*, 2 Peters, 245.—(*j*) Const. U. S., art. 1, s. 9 and 10.

wharves; (*k*) yet even that small duty, which might have been considered as a toll paid only for the use of the port itself, was held to fall within the scope of those constitutional provisions, and not allowable without the consent of Congress, which was given to that act of Assembly by Congress. (*l*) And which consent has been, from time to time, renewed since, as it has been found expedient or necessary to raise a fund, in that way, for clearing the port and repairing the public wharves. (*m*) And so, too, as a means of regulating commerce and preventing, preparing for, or of adding to the energies of war, the federal government has the power to lay an embargo; and thus, for a season, partially to interrupt the use of all wharves, by closing the public ports altogether against all foreign intercourse. (*n*)

Those public rights within a port which are involved in the exclusive internal government of the Republic, in all cases fall within the range of the powers of the state government; yet if the port itself be not within the body of a county; but, as an arm of the sea, be within the jurisdiction of the admiralty, then, as to acts committed in it; and as to all acts in any port which come within the jurisdiction of the admiralty, the tribunals of the state can take no cognizance of them; because the judicial power of the United States is extended to all cases of admiralty and maritime jurisdiction. (*o*) But in all cases where the tribunals of the states have an exclusive or concurrent jurisdiction, the state government may make and enforce all needful regulations for the purpose of giving a salutary system of police to the port itself, and its town, especially in so far as it may be within the body of a county, as is the fact of the port of Baltimore. (*p*)

Private rights in a public port may be of various kinds; but all of them are subject to those public rights, the regulation of which have been left either with the state, or delegated to the federal department of the government of our Republic. Any individual holder of the shore of a navigable river or haven may use it for the purpose of landing his own goods which are not chargeable with any duty; or he may suffer another to do so, upon any terms

(*k*) April, 1763, ch. 24, s. 10; *Hale de Portibus*, 78, 87; *Mayor of Yarmouth v. Eaton*, 3 Burr, 1402; *Casher v. Holmes*, 22 Com. Law Rep. 146.—(*l*) Acts Cong. 11 Aug. 1790, ch. 43.—(*m*) 1791, ch. 60; Acts Cong. 12 May, 1796, ch. 26.—(*n*) *Gibbons v. Ogden*, 9 Wheat. 192.—(*o*) *The United States v. Bevans*, 3 Wheat. 337; *Hastings v. Plater*, 1 Bland, 613, note.—(*p*) 1734, ch. 16; 1753, ch. 27; March, 1774, ch. 18; *Gibbons v. Ogden*, 9 Wheat. 203.

he may think proper to impose; but no goods which are chargeable with a duty can be landed in any other place than a public port. (q) A right of property in a public port itself may give to an individual a right to demand and receive tolls of various denominations; of which anchorage is an example. It has been determined, that land covered by navigable water may be granted by the state to an individual. (r) Whence it would seem to follow, that if the land covered by the navigable water of a public port was held as private property by an individual, he might have a right to demand and receive a reasonable toll for anchorage in the port, in respect of his property in the soil, and as an evidence of it. (s)

But the most common kind of private rights in a public port, are those which arise from an ownership of the adjacent shores. It is rare to find any port where suitable wharves, keys, and warehouses have not been built for the convenient mooring of ships, and the lading and unlading, and protection of merchandise; and where they have been erected it is most common that some duties are demandable for the use of all of them. These shore duties, as they are called, are of several kinds; but those which are the subject of the present controversy are, first, *moorage*, which is a sum due by law or usage for mooring or fastening of ships to trees or posts at the shore, or to a wharf; and secondly, *wharfage*, which is a toll or duty for the pitching or lodging of goods upon a wharf. (t) These two kind of shore duties, as thus designated in the English books, which are evidently distinct in their nature, the one as a charge for the accommodation of ships, the other as a toll for the use of a landing place for goods, are, in our country, generally, and certainly in the port of Baltimore, spoken of under the one common denomination of *wharfage*, the wharfage due from a vessel, and the wharfage payable on merchandise. (u) And this, perhaps, has arisen from the fact of no duty being demanded of ships which have been moored to the shore where there was no wharf.

All those shore duties demandable by an individual, which are affected by public rights, are not, therefore, held upon the same terms as private property of any other description. No man can

(q) *Hale de Portibus*, 73; Acts Cong. 2 March, 1799, ch. 128, s. 27 and 30.—(r) *Browne v. Kennedy*, 5 H. & J. 195.—(s) *Hale de Portibus*, 74; 1661, ch. 7, s. 1; 1682, ch. 4.—(t) *Hale de Portibus*, 76; *Mayor of Yarmouth v. Eaton*, 3 Burr, 1402.—(u) *Buszard v. Capel*, 13 Com. Law Rep. 377.

erect a new public port without the sanction of the government ; nor can he take, out of a port, any certain rates of wharfage for landing merchandise, although he may make particular agreements with every one who comes to his wharf or shore, by his consent, to land goods. And so, too, a man, for his own private advantage, may build a wharf in a public port, and take what rates for the use of it, he and his customers can agree upon, for in that he does no more than is lawful in making the most of his own. (*w*)

But it is otherwise of those wharves belonging to individuals, which have been legally thrown open to the use of the public, and also with regard to those which are entirely and properly public wharves. As to all such as belong to individuals, or a body politic, which are affected with a public interest, the wharfage must be reasonable ; and, after having been once legally adjusted, cannot be enhanced to an immoderate amount. Such wharves are subject to some statutory regulations in England ; (*x*) and here they are particularly alluded to in several of our acts of Congress regulating the collection of revenue from goods imported, as places dedicated to the use of that commerce which the federal government alone has a right to regulate ; and, consequently, no wharfage can be demanded for the use of any such wharf in a public port, either to an amount, or in a manner, so as in any way to give a preference prohibited by the federal constitution, or to interfere with the regulation of commerce, or the collection of such revenue by the federal government.

This I take to be the true intention of the provisions of the federal constitution in relation to the regulation of commerce, and the laying of duties on imports as declared by various acts of Congress, and admitted by our own legislative enactments. (*y*) And therefore, upon these principles I hold the act of Assembly which authorizes *The Mayor and City Council of Baltimore* to charge and collect such wharfage as they may think reasonable, from all vessels lying at or landing articles, *other than the productions of this state*, on any wharf belonging to *The Mayor and City Council*, or any public wharf of the city, to be unconstitutional and void. (*z*)

Where an individual is the owner of any such wharf to which

(*w*) *Hale de Portibus*, 77 ; 1825, ch. 179, s. 8 and 16.—(*x*) *Hale de Portibus*, 77 ; 1744, ch. 22, s. 2 and 15 ; 1817, ch. 225, s. 7 ; 1822, ch. 57, s. 7.—(*y*) 1791, ch. 60.—(*z*) 1827, ch. 162, s. 4 ; *Gibbons v. Ogden*, 9 Wheat. 196 ; *Brown v. The State of Maryland*, 12 Wheat. 442.

all persons may lawfully come for the purpose of lading or unlading their goods, he may be allowed by law to demand and receive certain specified and reasonable tolls for its use; because of his having expressly undertaken to be at all the charge of maintaining and repairing it. But in all cases, where the entire right of soil has been vested in the public, or where the wharf itself, or the place on which it has been built by public authority, has been condemned, or dedicated in any way to the use of the public, there no toll of any kind can be demanded; for, a toll is in the nature of a tax upon the people; and no tax of any description can be levied without the express sanction of the General Assembly. (a) Such a wharf may, however, be so regulated as to be made most generally and equally beneficial to all. (b) And where a wharf, like a road, or a street, has been once laid open and made free to all, no toll of any kind can afterwards be charged for the use of it, by any individual or body politic, who may happen to be the owner of the soil on which the wharf has been erected, or over which the road or street passes. (c) Nor, upon the principles admitted, in regard to the tonnage or port duties imposed by the before mentioned acts of Assembly, for the benefit of the port of Baltimore, and assented to by Congress, can the Legislature of the state, after a wharf or street, along the shore of a port, had been once dedicated to the public, free of all charge, impose any toll so as to infringe upon the rights secured, or the power granted to the federal government; which authorizes the charging of wharfage for the landing of articles other than the productions of this state. (d)

In this case, therefore, it is not only important as regards the interests of these contending parties themselves, that the title to charge wharfage for the use of these wharves should be clearly shewn; but it is also necessary that the right now claimed should be distinctly ascertained for the benefit of the people at large, and to prevent the federal and state governments from being brought into collision, by means of a wharfage duty collected under a state authority, pushing aside, or interfering with those on importations proposed to be collected under the federal government.

(a) *Warrington v. Mosely*, 4 Mod. 320; *Brett v. Beales*, 22 Com. Law Rep. 349; 1744, ch. 22, s. 15; 1753, ch. 28; 1803, ch. 64, s. 4 and 11; 1813, ch. 48; 1816, ch. 257; 1818, ch. 164; 1819, ch. 108; 1820, ch. 72; 1821, ch. 64 and 200.—(b) 1817, ch. 71, s. 7.—(c) *Hale de Portibus*, 77, 78; *The King v. Winstanley*, 3 Exch. Rep. 344; 1817, ch. 71, s. 7, and ch. 225, s. 7.—(d) 1827, ch. 162, s. 4; *Gibbens v. Ogden*, 9 Wheat. 196; *Brown v. The State of Maryland*, 12 Wheat. 442; *The Steam Boat Company v. Livingston*, 1 Hopkins, 209.

In regard to the subject of this controversy, it appears from the various legislative enactments in relation to it, that in the year 1766, the inhabitants of Baltimore, by their petition to the General Assembly, set forth that a large miry marsh, adjoining the town, was very prejudicial to the health of its inhabitants; and that the proprietors thereof, by their perverseness, or dilatoriness, had refused or neglected to remove the nuisance, which could only be done by changing the surface of the marsh into firm dry ground. Whereupon it was enacted, that *Thomas Harrison, &c.*, the owners of the said marsh, should, within one month after the end of that session of Assembly, give bond in a certain penalty, with surety to be approved by the commissioners therein named, within two years from the date, to remove the nuisance, '*by wharfing in all such marshy ground next the water,*' &c.; and should also 'cover all such marshy ground with stones, gravel, sand, or dirt, so as to raise the same not less than two feet above the level of common flood tides.' And it was further declared, that the said marshy ground should be laid out by the said commissioners into streets, lanes, and alleys, and thenceforth be deemed a part of Baltimore town. And in case the said *Thomas Harrison* should neglect to give bond as required, then the said commissioners were to have the ground divided into lots, and sold upon condition, to '*wharf in and secure all such marshy ground next the water,*' and also to have the same raised above tide as aforesaid. (e) After which *Thomas Harrison* gave bond as required, but not having been able to comply with its conditions within the time specified, he was allowed a further time; (f) which time was again extended by the Legislature. (g)

(e) 1766, ch. 22. A common nuisance is a species of offence against the public, being either the *doing* of a thing to the annoyance of the people, or the *neglecting to do a thing* which the common good requires, and which certain persons are bound to do; as by *neglecting* to repair a highway, bridge, or public river which the party was bound to repair; *Jacob Law Dict. v. Nuisance*. But this act of Assembly declares the *natural* condition of a certain tract of land to be a nuisance, and obliges its owner to remove such nuisance by altering and improving its natural condition. But although it may be regarded as a principle of justice necessarily arising out of the very nature of a legal title to property, that no individual or set of individuals should be permitted to determine how the property of another should be managed, altered, or improved for their own especial benefit, or to promote the general salubrity of the country. Yet, as an exception to this rule, a law may be passed providing for cases in which swamps, bogs, or wet land should be drained by ditches and embankments on the land of each owner, for the general benefit; upon the same ground, that the owner of a lot in a city may be compelled to pave the street in front of his lot; *Arator by John Taylor of Caroline*, page 172.

(f) May, 1763, ch. 22.—(g) September, 1770, ch. 7.

It further appears, that *Thomas Harrison* had, on the 4th of June, 1763, leased a certain lot of land in Baltimore town unto its commissioners for ninety-nine years, renewable for ever, reserving certain rent, upon which the inhabitants had erected a large building calculated for a market-house and other public uses, which lease the General Assembly by law ratified and confirmed. (*h*)

Some time after which *Thomas Harrison*, by his petition to the General Assembly, stated that he had accomplished his undertaking by converting the said marsh into firm ground, which had been laid out as an addition to Baltimore; 'and that the altering and laying out anew the said streets, lanes, and alleys, and opening a canal, leading from Baltimore street to the basin, would render the adjacent lots more convenient, conduce much to the advantage of that part of Baltimore town, and be the means of effectually draining the said marsh, without occasioning any detriment to the public.' Whereupon it was enacted accordingly, that the ground should be laid out anew; and that the canal should be opened. (*i*) After which an act was passed by the Legislature for the appointment of port wardens for Baltimore, who were directed to make a survey of the port, and of the course of the channel; and it was declared, that no wharf should be made, altered, or extended to the line of the channel, since commonly called the port warden's line, without their permission. (*j*)

From these legislative enactments it will be seen, that the making of wharves was one of the means by which this marshy ground, so added to Baltimore, was to be reclaimed; and that the wharves, thus required to be made, so far as they extended across and in front of the end of any streets, or other portions of that ground, so dedicated to the use of the public, must have been considered, like the streets themselves, public and free to the use of all, without paying toll of any kind; that the canal spoken of as 'leading from Baltimore street to the basin,' the lots adjacent to which would thereby be rendered more convenient; and as being 'the means of effectually draining the said marsh,' must have been a kind of *cul de sac*, or dock extending from the basin up into a wide space of it, with a street or landing place on each side; and as the marshy ground was to be 'secured next the water by wharves,' it is evident that such a canal or dock would give a

(*h*) 1765, ch. 34; Hanson's Laws, 1773, ch. 8.—(*i*) November, 1779, ch. 20.—(*j*) April, 1783, ch. 24.

much longer line of wharf, and thus 'conduce much to the advantage of that part of Baltimore town;' and that with a view to this, and other advantages, the streets, lanes, and alleys, which had been previously laid out over this ground, were to be altered and laid out anew. And it appears that a large building had been erected, and was then used as a market-house, and for other public purposes, on a lot, not a part of the marshy ground, which had been leased by Baltimore town. A recollection of the provisions of these legislative enactments, is necessary to a correct understanding of that which follows.

In the year 1784, it was represented to the General Assembly, that the then market-house of Baltimore was insufficient for the use of the town; and that two convenient places might be had for erecting market-houses, 'the one on that part of Baltimore town commonly called Harrison's marsh, and the other to the westward of the basin.' Whereupon it was enacted, that *Samuel Smith* and others, 'or a major part of them, shall have full power and authority by this act to build and erect a market-house on a parcel of ground situate in the said town, opposite Harrison street, beginning on Baltimore street, and running thence south, parallel with Gay street, of the width of one hundred and fifty feet, to Water street, with the privilege of extending the same to the channel; and that the said market-house, when erected, and the ground whereon the same shall be built, with the privilege aforesaid, shall be, and is hereby declared to be vested in the commissioners of Baltimore town, and their successors, forever, from and immediately after the said market-house shall be built and erected, to hold, possess, and enjoy the same market-house, ground, and privilege aforesaid, to and for the use and benefit of the said town, in as full and ample manner as if the said commissioners had been legally constituted a body politic and corporate in deed and in name.' (*k*) And it was further declared in the same act, that the commissioners of Baltimore town, as soon as convenient, 'after the new market-house on the said marsh shall be extended and built up, for the length of three hundred feet from Baltimore street, to lay off the ground which was heretofore leased for the use of the present market-house into convenient lots, and the same, together with the buildings thereon, set up and expose to public sale to the highest bidder, under such conditions as they may

(*k*) 1784, ch. 62, s. 2.

think proper, and three-fourths of the moneys arising from the sale of the same, when sold, to appropriate for building and erecting the said new market-house on the said marsh, *and completing the public wharves adjoining the same;*' and the other fourth to defray the expense of building the market-house to the westward of the basin. (1)

This parcel of ground on which this new market-house was to be built is thus described as extending one hundred and fifty feet in width, from Baltimore street to Water street, 'with the privilege of extending the same to the channel;' and consequently, 'the public wharves adjoining the same,' for the completion of which this law, thus in part provided the means, could only have been those public wharves in front of so much of this marshy ground as had been previously dedicated to the public, which its former owners had, as required, filled up and made in order to remove the nuisance complained of; and which, therefore, must have been, from their foundation, and always considered and treated as public wharves. This parcel of ground had been thus expressly dedicated to the use of the public for a market-house and wharves; and this law has not only named these two public uses, and authorized the application of certain public funds to defray the expense of making this ground useful to the public in both of those modes; but it has expressly declared, that it was held by the public 'with the privilege of extending the same to the channel.' It is not said how, or in what form this privilege is to be exercised; and hence, it is perfectly obvious, that it must give to the owners of the ground, within the specified extent, a right to alter the location and form of those public wharves at pleasure; they must be allowed to have, under this general privilege, the right to raise the ground above high-water mark, and to remove their wharves further in towards the channel; to have the right to give to their wharves the shape of a canal or dock, as had been formerly said to be most advantageous; or to make a short transverse wharf abutment immediately along the specified line of the channel. But whatever may be the location or form of such wharves they must, nevertheless, be considered and treated as 'the public wharves adjoining' to this ground, according to the clear and express terms of this law. And having been thus, by several solemn legislative enactments provided for and declared to be

public wharves, no alteration in their location or form can divest them of their free, open, and public character; or authorize any person or body politic to demand and receive toll for the use of them in any manner whatever; leaving them, however, according to the express terms of the law, 'subject to the regulation of the corporation of Baltimore relative to public wharves.' (m)

But even supposing the body politic, in whom the absolute right to this land had been vested, had a right to have levied a toll for the use of any wharf, they themselves might have built upon it; yet the contract of the 10th February, 1794, under which these wharves were actually built by *Dugan* and *McElderry*, is totally silent as to tolls of every description. No right is reserved to either of the contracting parties to demand and receive wharfage for the use of them, when made, any more than for the use of the streets which were to be filled up as specified. On the contrary, it is expressly declared, as a part of that contract, 'that the said canal, wharves, and streets on each side of the said canal be a common highway, and free for the public use, subject to such regulations as the commissioners and their successors shall from time to time establish.' Thus by express and mutual consent dedicating these wharves, when made, to the use of the public, as free and unencumbered by toll as any of the public streets of the city.

Finding no *express* authority either in the law, or in their contract, to demand and collect tolls; these contending parties endeavour to deduce their claim to wharfage, the one from its ownership of the soil, and an obligation to maintain the wharves thus erected; and the other from his merits, as the builder of this costly and valuable work, and from his obligation to keep it in repair.

This ground, 'commonly called Harrison's marsh,' upon which the Legislature had provided for the building of a new market-house and the completion of a then existing *public wharf*, having been thus vested in the city of Baltimore, as a body politic, and in general for the use of the town, was thereby laid open to the public free of toll; and no toll having been given in the grant by which it was so vested, none can be exacted by it from any one who may use either the market-house or *the public wharf*. For, it is a general rule applicable alike to markets, fairs, wharves, and roads, that where no toll is specially allowed in the grant or law by which they are authorized and laid open, none can be de-

manded; because toll being a matter of private benefit to the owner of the soil, not necessarily incident to a market, fair, wharf, or road, it cannot be charged in any case unless it be specially allowed, or the owner of the soil, when he dedicates it to the use of the public, then reserves to himself toll from those who pass over it. (n) But in regard to the use of a market, although no

(n) *Hale de Portibus*, 51, 73, 76, 78; 2 Inst. 220; *Smith v. Shepherd*, Cro. Eliz. 710; *Warrington v. Mosely*, 4 Mod. 320; *Truman v. Walgham*, 2 Wils. 296; *Colton v. Smith*, Cowp. 47; *Northleigh v. Luscombe*, Amb. 612; *Mayor of Yarmouth v. Eaton*, 3 Burr. 1402; *Brett v. Beales*, 22 Com. Law Rep. 349; 1830, ch. 45, s. 3.

SMITH v. HOLLINGSWORTH.—This bill was filed on the 13th of October, 1785, by William Smith, George Salmon, Andrew S. Ennells, Peter Hoffman, Aaron Levering, Hans Crevy, John Moale, Andrew Buchanan, Charles Garth, John Merryman, and John McHenry, of Baltimore, in behalf of themselves and others, against Samuel Hollingsworth and Thomas Hollingsworth. The bill stated, that the plaintiffs were the holders of ground and property in the town of Baltimore, contiguous to Calvert street; that the navigable water of Patapsco river flowed to the end of Calvert street, at which place there was and long had been a public wharf free for the use of the plaintiffs and all others trading to and from the town; by reason of which free public wharf all the property in its vicinity had been considered to be, and was, in fact, much more valuable; that to exclude the plaintiffs and to draw to themselves the advantages of those benefits of a good landing place on navigable water, the defendants, under pretence of authority, obtained from the port wardens, under the act of April, 1783, ch. 24, had filled up a space of nine feet wide, in front of this public street and wharf, extending into the water one hundred feet, so as considerably to narrow and obstruct the dimensions of and access to the public wharf; that the defendants are preparing to extend these obstructions two hundred feet further into the harbour; and that the port wardens cannot legally authorize any such filling up, or extension of their fast land as is pretended to have been given to these defendants. Whereupon these plaintiffs prayed, to be quieted in the enjoyment of their ancient rights; that the defendants might be restrained by an injunction; and for general relief, &c. This bill was sworn to by only one of the plaintiffs. And an injunction was granted as prayed.

To this bill the defendants put in their answer, in which they stated, that they were the owners of a lot of ground binding on Calvert street and the navigable water of the river Patapsco, which having a right to improve, according to the provisions of the act of April, 1783, ch. 24, they had accordingly improved and extended into the navigable water; and with the license of the port wardens they had extended the fast land of their lots in front of the street and wharf as alleged in the bill, in all which they were well justified by law, &c.

After the filing of this answer proofs were taken, and the case was brought before the court for final hearing.

5th November, 1787.—*ROGERS, Chancellor*.—The motion of the defendants to dissolve the injunction heretofore issued in this cause, came on to be heard, and argued in the presence of counsel concerned for the parties aforesaid; and the bill, answer, exhibits and proofs, being read, and appearing as hereinbefore set forth; and the said motion being heard and argued by counsel on both sides; and this court being of opinion, upon due consideration, that the wardens of the port of Baltimore town had not authority to grant to the said defendants the permission, in the bill and answer aforesaid mentioned, to extend the public street aforesaid called Calvert

toll can be charged for any goods brought into it; yet, to avoid confusion, if any one desires to have for himself the convenience of a particular stall; the owners of the market may lawfully charge toll for such a peculiar accommodation. (o)

Whence it is clear, that *The Mayor and City Council of Baltimore*, who are the successors of the commissioners of Baltimore town, (p) can have no right whatever to charge wharfage for the use of these wharves, although they are the owners of the soil; because no such right has been reserved or given to them in the grant by which they make title to the property; or has been reserved by the owner thereof at the time of its dedication to the use of the public; and further, because it is strongly to be inferred from the manner in which the grant itself speaks of a public wharf, that the right to collect tolls was intentionally withheld; and moreover, because these are public wharves, and the right to charge wharfage for the use of all such wharves, is expressly prohibited by a late act of Assembly, which leaves them free for the use of all, and like the public streets, to be repaired at the common expense of the city. (q)

It is laid down in general terms, as well in regard to a wharf as a highway, that where an individual citizen is clearly under an

street, in Baltimore town, into the harbour or basin of said town, inasmuch as it is expressly provided by the act of Assembly of this state, entitled an act appointing wardens for the port of Baltimore town in Baltimore county, that no wharf shall be extended so as to obstruct the said harbour or basin; and inasmuch as in the opinion of this court no private person had or hath a right to extend a public street, or any part thereof into the said harbour or basin; and the said wardens are only empowered, as this court conceives, by the said act, so far as it respects the extension of wharves, to give permission for extension of wharves to persons, who, independent of the said act have a right by law to extend ground or wharves into the waters of the said harbour, or rather, are only empowered to limit the extension of the ground or wharves of such persons.

Thereupon it is *Decreed*, that the said defendants and each of them, be and they and their ministers, agents and servants, hereby are absolutely and perpetually enjoined to desist and surcease from injuring or obstructing the free navigation of the north-west branch of Patapsco river to and from Calvert street in Baltimore town in Baltimore county aforesaid, and the public wharf at the south end of the said Calvert street, by putting earth, stone, timber, or other obstructions in the water of the said river in front of the said street and wharf, and within that space of water of the said north-west branch of Patapsco river, which is and will be included in and by the lines of the east and west sides of Calvert street aforesaid, being run and extended into the said north-west branch of Patapsco river to the channel thereof.—*Chancery Proceedings, lib. S. H. H. letter B, fol. 17.*

(o) *The Mayor of Northampton v. Ward*, 1 Wils. 114.—(p) 1796, ch. 68.—(q) 1813, ch. 118; *Ex parte Vennor*, 3 Atk. 772.

obligation to maintain and keep it in repair, he may charge a reasonable toll as a means of enabling him to discharge the duty thus imposed upon him. But then to entitle himself to claim toll upon the ground of his liability, he must shew that he has been actually thus bound; for, if he be not encumbered with any such duty he can make no claim to toll of any sort. (r)

But in this case, however enormous may have been the expense incurred by *Dugan* and *McElderry*; and whatever may have been their merits in making these wharves; the whole was nothing more than what was necessary to a faithful compliance with the terms of their contract of the 10th of February, 1794, from which, or any thing else here shewn, it does not appear, that they were under any sort of obligation to maintain and keep them in repair, after they had been once completed, according to the terms of their agreement. The benefit to which they looked, and which they actually derived from the costly work, so completed by them, was that of having an open street, and a free public wharf extending along a line of more than a thousand feet fronting on their lots, on which they could, and did, in fact, by themselves, or their lessees or vendees, erect valuable edifices. And this extensive benefit may fairly be considered as one to which, as prudent men, they might safely have looked for remuneration when they entered into this contract; and as one by which they have since been amply compensated for all their great expense and labour in building these valuable public wharves. There is, therefore, no ground upon which *Dugan* can be allowed to demand and receive wharfage for the use of these wharves.

It necessarily follows, from what has been said, not only that neither of these litigating parties have any right to demand and receive toll from any one for the use of these public wharves; but, that the doing so, by either of them, would be a violation of a public right; and yet it appears, from their own account of their proceedings, that they have, each of them, heretofore attempted to exact from, and, in many instances, have succeeded in imposing a tax, for their own emolument, upon the people who used these public wharves. To tolerate such a proceeding any longer would

(r) *Hale de Portibus*, 78; *Smith v. Shepherd*, Cro. Eliz. 710; *James v. Johnson*, 2 Mod. 143; *Warrington v. Mosely*, 4 Mod. 320; *Truman v. Walgham*, 2 Wils. 296; *Brett v. Beales*, 22 Com. Law Rep. 349; *Mayor of Yarmouth v. Eaton*, 3 Burr, 1402; *Colton v. Smith*, Cowp. 47.

be tacitly to sanction a wrong upon the public and the state; and therefore it must be put a stop to for the future. For, this court, not only can in no case pronounce a judgment against any right of the state which appears upon the record; though not insisted on by any one on its behalf; but, after having thus ascertained, that neither of the litigating parties has any right, it devolves upon the court, as a judicial duty, in all such cases to protect the interests of the state, and the rights of the people, thus manifested by the record, by all the means within its power, from injury, perversion, or violation in any way whatever. (s)

Upon the whole, therefore, it is my opinion, that these public wharves are no more liable to wharfage, than any one of the streets of the city are subject to toll; that these public wharves, like the public streets, are to be regulated by, and kept in repair at the expense of the city alone; and that, for the purpose of protecting the rights and interests of the public, each of these parties must be prohibited from demanding and receiving wharfage or toll of any description for the use of these public wharves.

Whereupon it is *Decreed*, that these three cases be and they are hereby consolidated, deemed and taken as one case, under the name and style of that which was first instituted. *Decreed*, that this case be and the same is hereby dismissed without costs, as by or against the widow and all the heirs or legal representatives of *Thomas McElderry*, deceased. *Decreed*, that the said *Cumberland Dugan* be and he is hereby perpetually prohibited and enjoined

(s) *Rex v. Leigh*, 4 Burr, 2146; *Penn v. Lord Baltimore*, 1 Ves. 454; *Barclay v. Russell*, 3 Ves. 436; *Gray v. Chaplin*, 3 Cond. Chan. Rep. 52; *Attorney-General v. Burridge*, 6 Exch. Rep. 356; *Dolder v. The Bank of England*, 10 Ves. 354; *Cockey v. Smith*, 3 H. & J. 26; *Plummer v. Lane*, 4 H. & McH. 72.

STALLINGS v. BROWN.—10th May, 1726.—*CALVERT, Chancellor*.—Upon a full hearing of the whole proceedings in relation to this cause, and upon mature consideration thereupon had, it appears, that the defendant had no right to prosecute the complaint at common law, for that the sole right is in the crown. Thereupon it is *Decreed*, that the injunction prayed for in the bill be perpetual; and that the defendant pay to the complainant all his costs and charges by him in the said cause laid out and expended.—*Chancery Proceedings, lib. S. R. No. 1, fol. 129.*

‘When the rights of the crown, (*the state*,) were brought forward by the claimant, in a way which it was impossible not to notice, the court was bound, as every court would be, to take care that justice was done to them. The rights of the crown, (*the state*,) are public rights, conferred not merely for private purposes, or for personal splendour, but for the public service, and to answer the great exigencies of public interest, and claims of justice; as such, they demand the active protection of every court, in which the occurrence of them is suggested to arise.—*Per Sir William Scott; The Elscbe, 5 Robinson’s Adm. Rep. 177.*

from demanding or receiving any moorage, wharfage, or toll of any kind, from the owner or holder of any ship or vessel, for laying or mooring her at, or making her fast to any part of the said wharves in the proceedings mentioned; and also from demanding or receiving any wharfage or toll of any description for any goods, wares, or property landed or placed upon or passed over any part of the wharves in the proceedings mentioned. *Decreed*, that *The Mayor and City Council of Baltimore* be and they are hereby perpetually prohibited and enjoined, &c., (in like manner.) *DECREED*, that each party pay his and their own costs, to be taxed by the Register.

From this decree both parties appealed. After which the General Assembly, reciting that a legal dispute existed as to the right to collect wharfage for the use of a portion of *Dugan's* wharf and *McElderry's* wharf, in the city of Baltimore, and that it was desirable, without prejudice to the right of any of the parties, *so claiming*, to provide for the collection of such wharfage, pending the said dispute, enacted, that on application as therein prescribed, the Chancellor should appoint a person to collect wharfage for the use of the said wharves, &c.; 1831, ch. 328. Thus, evidently, assuming the fact and the law to be, contrary to the decision of the Chancellor, that one or the other of these litigating parties must be entitled to demand and collect wharfage. Upon what constitutional principles can such a legislative enactment be sustained? The Chancellor submitted and executed this law; because, although it might not be regarded as a legislative declaration of a rule, but as a judicial interference by the legislative department with an act and a subject properly falling within the scope of the powers of the judicial department, yet, under the circumstances, it might be deemed most correct in him to leave the matter to be disposed of by the Court of Appeals. For the final decision of which tribunal see *Dugan v. The City of Baltimore*, 5 G. & J. 357.

COMPTON v. THE SUSQUEHANNA RAIL ROAD.

At common law an inquisition under a writ of *ad quod damnum* must be taken before the property of a citizen can be entered upon and taken from him for a public use.—Under the acts incorporating road and canal companies, unless otherwise provided, the damages may be assessed either before or after the property has been taken; except where, by an admixture, the value would be so obscured as to prevent the jury from making a fair valuation from their own view.—But no unreasonable delay or fraud in taking the inquisition will be suffered.

THIS bill was filed on the 17th of May, 1831, by *Thomas Compton* against *The Baltimore and Susquehanna Rail Road Company, George Winchester, William Gibbs McNeill, Charles Cheesborough, and William Stall*. The bill states that this body politic, by their agents, and particularly by the other defendants, entered upon the lands of the plaintiff, cut down his trees, and dug up his garden, meadows, fields, grass, and grain; and have so entirely destroyed his right of way that he cannot enter upon and depart from his lands as he was wont and has a right to do; that the company have neglected and refused to cause a jury to be summoned to assess the damages he has and is likely to sustain by their acts; that a pretended inquisition has been taken by a jury convened under a warrant issued by a person who was not in fact at the time a justice of the peace; that the supposed inquisition is defectively executed in form and substance, and is invalid and void; and that its return has been improperly withheld and delayed at the instance of the corporation; and when returned, a decision upon it was unjustly caused to be postponed by the body politic. Whereupon the bill prayed, that the company might be restrained by injunction from committing any further injury to his lands, &c.

17th May, 1831.—BLAND, Chancellor.—Ordered, that writs of *subpœna* and injunction issue as prayed by the foregoing bill of complaint. And it is further Ordered, that at any time after the filing of the answers of the defendants, the court will hear a motion to dissolve the said injunction; *Provided*, that the defendants give to the plaintiff or his solicitor, five days notice thereof. And the Register is directed to endorse a copy of this order on the writ of injunction, that it may be served therewith on the defendants.

To this bill *Isaac M. Cheesborough*, called in the bill *Charles Cheesborough*, and the other defendants, put in their joint and several answer, on the 30th of May, 1831, in which they stated that the

defendant *Winchester* was the president of the company; that the defendant *McNeill* was their principal engineer; and that the other defendants were their agents; that the company had, under authority of the act of 1827, ch. 72, by which they were incorporated, located their rail road over the land of the plaintiff; and were proceeding to construct it as alleged; that in repeated conversations with the plaintiff, he was assured that he should have a jury convened to assess the damages done to his land, whenever he thought proper; but his demands were so extravagant, that the company could come to no agreement with him, in consequence of which a jury was summoned and an inquisition taken in the manner prescribed by the act of incorporation; upon which the jury determined that the plaintiff would sustain no damage whatever by the rail road passing over his land; that at the place where the plaintiff's way, spoken of in his bill, passed over the route of the rail road, it became necessary to make a perpendicular cut of many feet, and the greater part through solid rock; and consequently, his right of way was turned in another direction, equally convenient, over the route of the rail road; that the inquisition was not withheld at the instance of these defendants; but was, in fact, returned within a very short time after it was taken, and to the then next session of the County Court; and the hearing of the plaintiff's exceptions to it was necessarily, and only postponed to the next term, because he refused to consent to the fixing of a day in that term for the hearing; that there had been no procrastination at the instance of the company in the taking or returning of the inquisition, or of the hearing of the exceptions to it; that the warrant for the taking of it had been issued by a justice of the peace; and it had been, in all respects, regularly and legally executed, with full notice, and in the presence of the plaintiff and his solicitor, who was fully heard by the jury.

The defendants after filing their answer gave notice of a motion to dissolve the injunction as allowed by the order of the 17th of May.

4th June, 1831.—BLAND, *Chancellor*.—This case standing ready for hearing on the motion to dissolve the injunction, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

The act of Assembly by which this company have been incorporated, authorized them to construct a rail road from the city of Baltimore to the river Susquehanna; and, for the purpose of exe-

cutting that work, deemed to be of public utility, they have been authorized to cause lands, held as private property, to be taken and condemned to that use; and, according to the mode specified, the owners are allowed to obtain a compensation for the injury they may sustain by the construction of the proposed rail road over their lands. (a) It has not been intimated that this legislative enactment is, in this or in any other respect, unconstitutional; and therefore, the only questions which this court can now be called upon to consider are such as relate to the fairness of the conduct of the body politic in the execution of their act of incorporation.

By its fifteenth section it is declared, that in all cases where the company cannot agree with the owner of any land which may be wanted for their road, they may have it condemned by a jury to their use. It is not said that the damages must be ascertained by a jury *before* the company enters upon the land for the purpose of constructing their road; nor is any time specified within which the inquisition must be taken; but it is declared that the inquisition shall be returned to the clerk of the county, and shall be confirmed by the court at its next session, if no sufficient cause to the contrary be shewn; and when confirmed shall be recorded; and further, that upon the payment of the valuation to the owner of the land, the estate and interest therein shall vest in the company. But it is manifest from the general nature of this provision, that if the benefit estimated by the jury as likely to result to the owner from conducting the rail road through his land should amount to a total extinguishment of his claim for damages, that then the estate and interest must vest in the company immediately upon the confirmation of the inquisition; because, where nothing is required to be paid by the corporation, the confirmation of the inquisition by the court must be considered as that last act upon which the vesting of the interest in the company is to depend.

The objects of the inquisition are to designate the land taken, and to compensate the owner to the full extent of the injury he may sustain. Hence it cannot be indispensably necessary, in all cases, to have it taken before the company proceed to construct their road; because, the estimate of damages may, in many cases, be as accurately made after the road has been nearly or entirely completed, as before the land was entered upon for the purpose of its construction. Indeed as to all deep cuttings, or high

embankments, to a sensible jury of the country, the ascertaining of the damages which the owner of the land would, or had sustained, would be much more clearly understood and readily estimated on viewing the work after it was done, than it could be by any description given of what it might be when done. But, where a public road is proposed to be opened under the authority of the county court, it is expressly declared, that the damages shall be paid to the respective parties before the road shall be opened; and consequently, the site of such a proposed road must be viewed and laid down, and the damages assessed before any entry can be made upon it. (b)

There is another and a more special provision in the eighteenth section of this act of incorporation, which expressly requires the valuation to be made before the property proposed to be taken is changed or altered by admixture with other substances. The reason of this is also sufficiently clear; the two provisions, taken in connection, shew, that it was intended, in all cases, that the subject of the inquisition should be viewed and inspected by the jury; and that they should have it so placed before them as to enable them to form a correct judgment as well from what they saw as from what they might hear in proof. In the case of an injury done by deep cutting or embankment, the understanding of the jury would be more enlightened by inspecting the work after it was done, than by viewing the site of the road before it was constructed; and therefore, the inquisition would be best taken after the road had been made; but in other cases, or where the materials proposed to be taken are to be blended with other substances, then it is clear, as the law expressly requires, that the inquisition should be taken before the admixture or alteration has been made.

These provisions of this act of incorporation are similar to those of almost all other laws authorizing land to be taken for the making of roads and canals; and they have been introduced into this and all similar acts of the Legislature, as a substitute for the ancient writ of *ad quod damnum*; and therefore, so far as the Legislature have been silent as to the mode of proceeding, or the nature of things requires it, they must be governed by the general principles of law applicable to the proceedings under a writ of *ad quod damnum*; since the object to be accomplished by both is the same. (c) According to the common law the inquisition under a

(b) 1818, ch. 89, s. 10.—(c) *Rex v. Inhabitants of Flecknow*, 1 Burr, 465.

writ of *ad quod damnum* is, in all cases, required to be taken *before* the property can be entered upon, unless it should be specially dispensed with by statute, or the grant itself; (d) but, in this

(d) Jacob Law Dict. v. *Ad Quod Damnum*.

PRESSLY'S CASE.—Charles, absolute Lord and Proprietary of the Province of Maryland and Avalon, Lord Baron of Baltimore, &c.

To the sheriff of St. Mary's county, *greeting*; we command you, that by the oaths of twelve honest and lawful men of the county by whom the truth of the matter may be better known, you diligently inquire if it be to the damage of us or others, if we grant unto Col. Peter Pressly, of the colony of Virginia, twenty acres of land lying upon the head of St. Mary's river, in Saint Mary's county, aforesaid, being the place where Thomas Waughop formerly had built a water-mill upon, *viz*: ten acres on one side of the head of said river, and ten acres on the other side thereof, together with liberty to take, fell, cut down and carry away, either by land or water, any wood or timber wood fit for building a mill, other than timber fit to split into clapboards, next adjoining to the said twenty acres of land lying on each side of the said river in the county aforesaid. And if it be to the damage and prejudice of us, and to what damage and prejudice of others, and of whom, and in what manner, and how; and of what value they are by the year, according to the true value thereof now, before any further improvement of the said twenty acres of land, and who are the present possessors of the said twenty acres of land, and what lands and tenements remain to the said present possessors, over the said twenty acres, will suffice to uphold their manor, *viz*: the sixth part of their manor allotted them by the conditions of plantations for the demesne as before the alienation; so as the county, by the alienation aforesaid, in default of the present possession, more than was wont, be not charged and grieved. And the inquisition therein openly and distinctly made to us in our Chancery under the seal and seals of them by whom it was made, without delay, you send. Witness ourself, at the city of Annapolis, this twenty-fourth day of October, in the seventh year of our dominion, Annoque Domini 1722.

E. GRIFFITH, *Reg. in Chan.*

Maryland, st.

An inquisition indented and taken, by virtue of the writ which is hereunto annexed, at the head of St. Mary's river, in Saint George's and Saint Mary's hundred, in the county of Saint Mary's, by the oath of Richard Forrest, William Coombs, Timothy Tolle, Henry Taylor, Thomas Price, William Price, John Hilton, Clement Cheverill, John Cole, John Green, Alexander Ferguson, and John Morgan, honest and lawful men of the vicinage, who upon their oaths do say, that ten acres of land lying on the east side of the run of Saint Mary's river, being the place where formerly Thomas Waughop had built a water-mill, is part of a tract of land now in the possession of a certain Charles King, whose name and contents they know not, is to the damage of the said Charles King, the sum of twenty shillings current money of the province, and is of the yearly value of twelve pence, like current money; and the ten acres of land lying on the west side of the run aforesaid, is part of his Lordship's mill manor, and is to the damage of his Lordship, the Right Honourable the Lord Proprietary of this province, the sum of twenty shillings, current money of this province, and of the yearly value of twelve pence, like current money.

In witness whereof, as well the sheriff of the county of Saint Mary's aforesaid, as the jurors by whom this inquisition was taken, have hereunto affixed their seals, this thirtieth day of August, in the year of our Lord one thousand seven hundred twenty and three. (Signed)

RICHARD HOPEWELL, *Sheriff, &c. &c.*

instance, it is obvious, that the taking of the inquisition, as a preliminary to the property's being made use of by the company is only required in some few particularly specified cases. In the taking of an inquisition under this and similar statutory provisions, it must appear, that the authority so given has been pursued; and, as under a writ of *ad quod damnum*, there should be no unreasonable delay, much less could any fraudulent practice be allowed to pass without check or rebuke. (e)

In this case it is clear, from the answer, all the statements of which on this motion must be taken to be true, that the inquisition has been had before the property taken was covered up or obscured by admixture with other substances; and, at a time, and in a manner when the jury were enabled to form a correct estimate of the claim for damages; and, it is also manifest, that there has

Maryland, Saint Mary's County, st.

At the request of Peter Pressly, of the colony of Virginia, gentleman, in the presence of the sheriff and a jury of the vicinage, I have laid out twenty acres of land, viz: ten acres on each side of the main fresh run of Saint Mary's river, it being the place where formerly stood a mill belonging to Thomas Waughop, of Saint Mary's county, gentleman. The ten acres, on the east side of the said run, being part of a tract of land now in possession of Mr. Charles King, of the said county, the said ten acres being thus bounded; beginning at a Spanishtoak marked with six notches, standing on the east side of the said run, and running thence north fifty-eight degrees, east forty perches, north twenty-eight degrees, west forty perches, south fifty-eight degrees, west forty perches, then by a straight line to the first beginning. And the ten acres on the west side of the aforesaid run, being part of his Lordship's mill manor, and heretofore taken up for the use of the said mill by the said Thomas Waughop, and bounded as follows; beginning by the run on the west side of the same, opposite to the end of the last line of the former ten acres, and running thence south fifty-eight degrees, west forty perches, then south twenty-eight degrees, east forty perches, then north fifty-eight degrees, east forty perches, then with a straight line to the beginning. Surveyed the 30th day of August, 1723,

Chancery Proceedings, lib. No. 3, fol. 1052.

Per me LAWRENCE LANT.

The above proceedings were had under the act of 1704, ch. 16, which in its preamble, among other things, stated, that 'as the most part of the places fit for setting up water-mills, are already in the hands of persons under age, or unable to be at the charge of building a water-mill, or else such as are wilfully obstinate in forbidding and hindering such persons as would purchase the said places fit for building water-mills, and set them up, to the increase of our trade and navigation; much to the public damage of this province.' And then enacts, that any person may acquire a title to a mill-site as therein prescribed; and gives the form of the writ of *ad quod damnum* under which such proceedings were to be had. But this act, except its sixth and seventh sections, was repealed by the act of 1766, ch. 10, with a saving of the rights of those who had previously taken out writs of *ad quod damnum*.

(e) *Ex parte Vennor*, 3 Atk. 766; *Rex v. Inhabitants of Flecknow*, 1 Burr, 465; *Rogers v. Bradshaw*, 20 Johns. Rep. 735; *Rex v. The Mayor of Liverpool*, 4 Burr, 2244; *The King v. Bagshaw*, 7 T. R. 363.

been no unreasonable delay, misrepresentation, or fraud practised by any one to the prejudice of the plaintiff; and therefore, this company cannot, from any thing now appearing, be any longer restrained from proceeding with their work.

Whereupon it is *Ordered*, that the injunction heretofore granted in this case, be, and the same is hereby annulled and dissolved.

PRICE v. TYSON.

The nature of a bill of discovery.—A defendant in answering a bill of discovery may set forth any pertinent matter in avoidance.—In general, no matter stated by way of answer which affords such information as the bill calls for, or which may be needful as a defence can be deemed impertinent.—Nor can any matter which is pertinent to the case be deemed scandalous.—The legality of evidence, brought out by a bill of discovery, must be determined by the court of common law for whose use the discovery was made.

THIS bill was filed on the 8th of February, 1831, by *William Price*, administrator of *John Price*, deceased, against *Mary Tyson*, *Isaac Tyson* and *Moses Sheppard*, administrators of *Nathan Tyson*, deceased. The bill states, that in the year 1817, a suit which had been previously instituted by the plaintiff's intestate, against the intestate of the defendants, was transmitted from Baltimore to Harford County Court; and was there, by an order of that court, referred to arbitration; but no award having been made, it was in 1826, reinstated; that the defendants had pleaded in abatement the death of the plaintiff before they had been summoned as defendants, which plea was finally overruled by the Court of Appeals; that the object of the suit at law was to recover a large sum of money due from the freight of a vessel chartered by the plaintiff's intestate to the intestate of the defendants; that these defendants pretending ignorance of any suit having been instituted against their intestate, in his life-time, for the recovery of this debt, have pleaded in bar thereof, that they had fully administered the estate of their intestate without any knowledge of the plaintiff's claim, or of the pendency of the suit at law; that the defendant *Mary* is the widow, and the defendant *Isaac* is the brother or near relation of their intestate; and both, being intimately acquainted with his affairs, did know, that the controversy between the late *John* and the late *Nathan* had been referred to arbitration, and had never been settled; and that the defendants before the 10th of October,

1821, had employed counsel to attend to the interests of the estate committed to their care in that controversy. Whereupon the plaintiff prayed, that he might have a full and fair discovery of the knowledge of the defendants in the premises to enable him to protect himself against their plea in bar, a matter difficult from other proof, by reason of the great lapse of time since the institution of the suit.

The defendants on the 11th of July, 1831, put in a joint and several answer to this bill, in which they admit, that it was then known to them, that the suit had been instituted and referred to arbitration as alleged in the bill; and then they add, that no further proceedings were afterwards had in the said suit, as these defendants are informed and believe, during the life-time of the said original parties, nor until several years after the death of both the said *John Price* and *Nathan Tyson*, and after the distribution of the personal estate of the said *Nathan*.

These defendants further admit, that administration had been granted to them on the 1st of April, 1819; and then in addition, they say, that on the same 1st of April, an order was passed by the said Orphans Court, directing, that an advertisement in the form prescribed in such cases by the act of Assembly, should be inserted once a week for four successive weeks in *The Federal Gazette*, and also in *The American*, two newspapers published in the city of Baltimore, giving notice, that the defendants had obtained from the said court such letters of administration on the estate of the said *Nathan Tyson*, and warning all persons having claims against the said deceased, to exhibit the same with the vouchers thereof to these defendants before a certain day to be named in such advertisement; and these defendants did accordingly in obedience to said order, and as directed by the said Orphans Court, cause such advertisement, giving the said notice and warning to all persons having claims against the said *Nathan Tyson*, deceased, to exhibit the same with the vouchers to these defendants on or before the first day of October next thereafter, to be inserted in the said *Federal Gazette* newspaper, on the day next after passing the said order of court, *to wit*: on the second day of April, in the year 1819, aforesaid, and in the said *American* on the 3d of April aforesaid; and such insertion to be continued in each of the said newspapers once a week for four successive weeks, and these defendants caused the said advertisement to be so inserted in the said two newspapers as directed by the said

court more than six months before they made distribution of the assets of the personal estate of the said *Nathan Tyson*; which distribution was not made by them until the tenth day of October in the year 1821, at which time the whole personal estate of the said *Nathan Tyson* in the hands and possession of these defendants, was by them, under the direction of the said Orphans Court, divided and distributed among his personal representatives; as by a copy of the account of such distribution duly certified by the register of wills of Baltimore county under the seal of the said Orphans Court, which these defendants herewith exhibit, and pray that the same may be received as a part of this their answer, will more fully appear. And these defendants further answering, say, that at the time of the death of the said *Nathan Tyson*, and of the insertion and publication of the advertisement aforesaid in the newspapers aforesaid, and for many years before and during, and more than a year after the time of the said insertion and publication, the said *John Price* was living and residing in the city of Baltimore; and these defendants are informed and believe, that the said *John Price* was a subscriber to the *American*, one of the said newspapers, during the said time, and that the same was delivered each day of publication at the dwelling-house of the said *John Price* in the said city, during the whole time of the insertion therein of the advertisement aforesaid; and these defendants at, and long before the death of the said *Nathan Tyson*, and always since, have resided in the said city of Baltimore. And these defendants jointly and severally aver and declare, that from the time of the death of the said *Nathan Tyson* until the time of making the distribution of the assets of his estate herein before mentioned, neither the said *John Price* nor any person on his behalf, exhibited to these defendants or to either of them, any claim of the said *John Price* against the said *Nathan Tyson*, or made either in writing or orally, any demand or claim from them, or either of them, as administrators as aforesaid, or otherwise for the said *John Price* against the said *Nathan Tyson*; or in any manner conversed with these defendants, or mentioned to them or either of them any thing relating to any claim or action of the said *John Price* against the said *Nathan Tyson*.

These defendants further answering, deny that they or either of them did as administrators or otherwise, apply to any counsel or attorney in regard to the claim or action of the plaintiff's intestate, or conversed with any counsel, attorney or other person, or with

each other concerning the said claim or action; from the time of the death of the said *Nathan Tyson* until after the 10th of October, 1821, when the distribution was made of the personal estate of the said *Nathan Tyson* as aforesaid; and these defendants further say, that the said *John Price* continued to live and reside in the said city of Baltimore, until after the said distribution was made; and did not depart this life as these defendants are informed and believe, until the 14th of October, 1821.

The defendant *Mary* answering for herself, admits, that she as the widow of her intestate, was entitled to one-third of the surplus of his personal estate, and alleges, that after paying off all the just claims exhibited to the administrators; she had retained her distributive share, and further, that she knew, in the life-time of her husband, early in the year 1815, that an agreement was about to be made between the said *Nathan Tyson* and *John Price*, relating to the freight of a quantity of flour of said *Tyson's*, which was to be transported in a vessel of said *Price* from Baltimore to some island of the West Indies; and then she adds, that being present at a conversation between the said *Tyson* and *Price* on that subject; *Price* observed, that he considered it to be only reasonable and just, that the freight should be reduced to a peace rate, if it should be known before the vessel which was to carry the flour sailed from Baltimore, that peace was made between the United States and Great Britain; and that he was willing such a condition should be inserted in the contract for the freight of the flour to be transported; and the said *Price* and *Tyson* in that conversation, entirely agreed in the opinion expressed by them in regard to the reduction of the rate of freight in the event of peace being known in Baltimore to have been made before the sailing of *Price's* vessel; and it was then, as she understood, agreed between them, that it should form a part or condition of their agreement for freight.

The defendant *Mary* further answering, admits, that she learned from her intestate, that in consequence of a dispute, the plaintiff's intestate had brought suit against her intestate for the whole or some part of the freight of the flour; that she did know, that the dispute had been referred to arbitration, but did not know, that it was not settled; and then adds, that the impression made upon her mind by the knowledge, that such reference had been made, as well as from the fact, that she heard nothing on the subject afterwards, was that an end had been put to the suit as well as to the dispute.

The defendant *Isaac* admits, that his intestate was his brother ; and that he did know, in the life-time of his intestate, that he had a dispute with the plaintiff's intestate in relation to a claim for freight which he heard and believed had been referred to arbitration ; and then adds, that he was fully under the impression, that it had been finally settled or abandoned.

The defendant *Moses* answering for himself, says, that he supposes from his intimacy with his intestate during his life-time, that he was acquainted with the existence of a dispute between him and the plaintiff's intestate, but he has no particular recollection of it ; that he has no recollection of the reference of any dispute between them to arbitration ; and then he adds, that if he had any knowledge of such dispute or reference, his belief now is, that he considered it to have been finally settled in the life-time of said *Tyson*.

The defendants severally deny that they made or caused any inquiries to be made in relation to the claim of the plaintiff's intestate until after the 10th of October, 1821, when the distribution of the surplus of their intestate's estate was made ; and they aver, that they did not, prior to that time, employ any one to inquire into the situation of the plaintiff's suit. And to the whole of what these defendants had said, by way of a joint and several answer, they added, that from the time of granting letters of administration to them on the personal estate of the said *Nathan Tyson*, until and after the time of making distribution of the said personal estate herein before mentioned, they had no notice, information, intimation, or recollection, that any action was pending in Harford County Court, or elsewhere, against the said *Nathan Tyson*, or against these defendants as the administrators of his estate, at the suit of the said *John Price* or of the complainants.

Immediately after this answer was filed the plaintiff put in his exceptions to it, alleging, that all those various matters which the defendants had impertinently introduced into their answer, in addition to what he conceived were expressly called for by the bill, were foreign from his inquiries, as well as the account exhibited with the answer as a part of it ; all of which he therefore prayed might be expunged as being wholly irrelevant and impertinent. And the plaintiff also objected, that what the defendant *Mary* had said in relation to the agreement about the freight, was inadmissible and improper ; because the contract between the said *Price* and *Tyson* for the freight of the said vessel, being in writing, and

containing no such stipulation as the one referred to in said answer, a fact well known to the said defendants.

11th July, 1831.—BLAND, *Chancellor*.—*Ordered*, that the foregoing exceptions stand for hearing on the 22d day of the present month; *Provided*, that a copy of this order, together with a copy of the said exceptions, be served on the said defendants or their solicitor on or before the 15th instant.

Copies having been served as required by this order, the case was again brought before the court.

3d August, 1831.—BLAND, *Chancellor*.—The exceptions to the answer standing ready for hearing, the solicitors of the parties were fully heard and the proceedings read and considered.

This is properly a bill of discovery, and nothing more; and therefore the case must finally terminate here with the answer; it can go no further; there can be no hearing upon the merits as where relief as well as discovery is asked for. (a) This court having no criminal jurisdiction itself, meddles with no cases of that description which may be brought before any other tribunal; and therefore a plaintiff here can only obtain a disclosure of facts by a bill of discovery in relation to a civil case; either to enable him to commence his action aright, or to prosecute it with effect. If upon the face of the bill, it appears that there can be no remedy, the plaintiff here cannot have a discovery, which in such case would be useless and altogether impertinent; nor can a bill of discovery be sustained against any one not interested in the matter in dispute, who may be examined as a witness; and consequently, the plaintiff must by his bill point out the individual who he has already sued, or against whom he means to bring his action; and also so state the nature of his case as to enable the court to judge of the alleged liability of the person designated as a defendant. (b)

This plaintiff states that he is seeking the relief he claims by an action now depending in a court of common law; and although he has by very brief and general expressions stated the nature of his case; yet its character and object are sufficiently shewn to enable this court to judge of the bearing of the liability, and to see that if his claim has any foundation whatever, in point of fact, the

(a) *Hindman v. Taylor*, 2 Bro. C. C. 8; *Shaftsbury v. Arrowsmith*, 4 Ves. 71.—

(b) *Rondeau v. Wyatt*, 3 Bro. C. C. 155; *The Mayor of London v. Levy*, 8 Ves. 404; *Cartwright v. Hateley*, 1 Ves., junior, 292.

action at common law has been properly originated and now revived against these defendants; and therefore he is entitled to the discovery he asks from them.

This, it has been urged, being a mere bill of discovery, in which the plaintiff asks only for a disclosure of the defendants' knowledge of a specified fact, they cannot be permitted to set forth, in their answer, any thing foreign to that special inquiry. If this position be correct, then every thing in an answer to a bill of this kind, which cannot be comprehended within the terms of the interrogatories propounded, no matter what may be the nature of the case, must be rejected as irrelevant. The validity of this position, therefore, presents a preliminary question, which must be determined before any inquiry can properly be gone into as to how far the matter objected to may be considered as impertinent in regard to the whole case as stated by this bill.

If a plaintiff has a right to relief in this court, he has a right to an answer from the defendant to every allegation of his bill, the admission of the truth of which, or the proof of the truth of which is necessary to entitle him to relief. (c) And after having given, in all respects, such an answer as the bill requires, the defendant may, and indeed, always should go on, by way of further answer, to state all matters in bar, or by way of avoidance which he may make available as a defence against the plaintiff's claim; for it is a well established rule, that a party cannot be allowed to offer evidence to sustain any allegation which he has not made and relied upon in his bill or answer. (d) As where to a bill for a specific performance, although the defendant is bound to answer fully as to the agreement relied on by the plaintiff; yet he may, by way of avoidance, and as a defence against the claim presented by the bill, set forth the agreement which was really entered into between them; and the plaintiff may, if he admits the truth of the defendants' answer, amend his bill and take a decree accordingly upon the discovery and confession of the defendants. But having, by his amendment, virtually waived all claim founded on the contract as set out in his original bill, he cannot be allowed to offer proof to sustain such claim after the amendment has been made. (e)

The object of a discovery from the defendants for the purpose of giving relief here, is to obtain evidence in relation to the subject

(c) *Cooth v. Jackson*, 6 Ves. 37.—(d) *Whaley v. Norton*, 1 Vern. 493; *Sidney v. Sidney*, 3 P. Will. 276; *Clarke v. Turton*, 11 Ves. 240; *Smith v. Clarke*, 12 Ves. 480.—(e) *Lindsay and Lynch*, 2 Scho. & Lefr. 9.

in controversy, either because the plaintiff cannot otherwise prove the facts or in aid of proof. And hence the answer should, in all cases, not only disclose the truth, but the whole truth; it should not only speak the truth in relation to a particular circumstance, or part of the case; but the whole truth in regard to all the component parts of that case which is the subject of litigation between the parties. For, otherwise, if the plaintiff were allowed, by special interrogatories, to cull from the defendants' knowledge of the whole matter in dispute only such particular facts as suited his purpose; and the defendants were rigidly confined to the making of only such answers as such interrogatories would warrant, the truth of the case might be most grievously distorted and the whole course of justice perverted. 'This as to a bill for relief as well as discovery, is sufficiently evident.

The object of the discovery prayed by this bill is not, however, to enable this court to give relief, but to aid a court of common law in giving it. This plaintiff, it appears, can only obtain relief from a court of common law according to the facts which he may be able there to establish.

It is the duty of a court of justice to act only according to the whole truth; it cannot allow any pertinent and legal testimony to be withheld or garbled; and it is of no kind of consequence whether the proofs are brought before it by means of its own process, or by the help of any other tribunal, so they be competent, credible, and pertinent.

This bill does, in effect, perform the office of a summons for witnesses to attend and testify before the court by which the plaintiff's case is to be tried and determined. It collects evidence to be used in that court, in like manner, as the testimony of witnesses who may be brought before it, and sworn to speak the truth, the whole truth, and nothing but the truth. Looking to the general character of unreserved fulness and frankness, always expected from, and so commonly attributed to answers to bills in Chancery; if these defendants were to stop short with a bare response to the plaintiff's interrogatories, and fail to set forth, in their answer, the matters necessary in any way to their defence at law, it might, perhaps, be objected in the court of common law, as it certainly might well be insisted upon here, on a hearing with a view to relief, that they should be allowed to offer no proof in relation to any defence which they had failed to rely upon in their answer; upon the ground that when called on to shew their de-

fence, they had tacitly waived all such matters as were not set forth in their answer.

And besides, it is certain that a mere bill of discovery may be so amended, after the defendant has answered, as to pray for relief in this court; and it is an established rule, that in answering even such an amended bill, the defendant must confine himself to it alone, and cannot be permitted to put in a complete answer over again; and therefore, it is not only allowable, but necessary for the defendant's own safety, that he should set forth and rely upon his defence in his answer to such an original bill, lest it should be so amended as to make it necessary for him to sustain such a defence even in this court. (*f*)

I am, therefore, satisfied that a defendant, in making answer to a mere bill of discovery, must be permitted to introduce all matters in avoidance; and to take as wide a range, over the whole case, as would be allowed to him if the bill prayed for relief from this court as well as discovery; and that there is, in this respect, no material difference between a mere bill of discovery and a bill for relief.

This then is a case in which the plaintiff excepts to the defendants' answer; because it sets forth various matters which are impertinent; and also, because it attempts to control a written by a verbal contract.

It has always been the practice in this court, in all cases where either party excepts to the pleadings for impertinence, scandal, or insufficiency, to file the exceptions in writing, and then move for an order appointing a day for the hearing, on notice to the opposite party, or his solicitor. And all such exceptions, in the same case, may be brought to a hearing at the same time and together before the Chancellor, and disposed of at once, without delay or embarrassment. (*g*)

It is the duty of the court to take care that its records be kept pure, to prevent them from being made the repositories or vehicles of scandal, and to see that the answers do not contain useless and impertinent matter. And although there may be a difficulty in answering properly in some cases, as to a bill for an account and the like, without running into long details; yet unreasonable prolixity and mere verbiage should in all cases be avoided; and may be

(*f*) *Hildyard v. Cressy*, 3 Atk. 303.—(*g*) 2 Fowl. Exch. Pra. 2; *Raphael v. Birdwood*, 1 Swan. 228; *Mortimer v. West*, 3 Swan. 229.

checked by the court itself wherever it can be done without improperly retarding the progress of the suit. The general rule is, that if the answer goes out of the bill to state any matter, not material to the defendant's case, it will be deemed impertinent and may be expunged; but nothing can be considered irrelevant that may have an influence upon the suit, attending to the nature of it. Yet if what is pertinent be so mixed with that which is impertinent, that the one cannot be separated from the other, the whole matter with the impertinency mixed shall be expunged. And if such foreign matter in an answer be scandalous as well as impertinent, it may be struck out at the instance of a co-defendant, or even a stranger, as well as the plaintiff in the case; and that too at the costs of the party by whom it was filed. (*h*)

The general rule as to impertinence seems to be sufficiently clear in itself; but the proper application of it to cases as they arise, has, in many instances, caused so much hesitation, that it may be well just to mention some few of the instances which afford illustrations of it.

In a case in which *Anna Peck* and *Anna Maria Peck* filed their bill as widow and daughter of *John Peck*, deceased, against his eldest son and others for dower, and their respective shares of the deceased's personal estate. The eldest son put in his answer, which he entitled thus: 'The several answer of *John Peck*, one of the defendants to the bill of complaint of *Anna Baines, alias Green*, assuming to herself the name of *Anna Peck*, as pretended wife of *John Peck, Esq.*, deceased, and of *Anna Maria Green*, assuming to herself the name of *Anna Maria Peck*, as daughter of the said *John Peck, Esq.*, deceased.' To this the plaintiffs ob-

(*h*) *Shaftsbury v. Arrowsmith*, 4 Ves. 71; *Coffin v. Cooper*, 6 Ves. 514; *Lord St. John v. Lady St. John*, 11 Ves. 538; *Norway v. Rowe*, 1 Meriv. 355; *Oliver v. Haywood*, 1 Anstr. 82; *Mason v. Mason*, 4 Hen. & Mun. 414; *Cheseldine v. Gordon*, 2 Bland, 79.

BIRCHFIELD v. SHARP.—19th January, 1714.—*HART, Chancellor*.—*Ordered*, that the complainant have liberty to take the bill off the file, and to file a new bill without costs; and have time till Monday next to declare which bill he will amend. And that the other bill which is ordered to be taken off the file, be not so taken off, but that it be lodged in the office where it may at any time be had.—*Chancery Proceedings, lib. P. L. fol. 83*.

NEALE v. CALVERT.—1717.—*HART, Chancellor*.—Forasmuch as it appears, that the bill of complaint exhibited by the complainant against the defendant is altogether scandalous for the ill language therein. It is *Ordered*, that the bill be dismissed out of this court; and that the defendant recover his costs by him expended in the defence of this suit against the complainant.—*Chancery Proceedings, lib. P. L. fol. 376*.

jected, because of its being impertinent and scandalous. And the exception was allowed; because there was no reason to fear that the title of the answer should prejudice the defendant, as an admission of the plaintiff's right, or work any conclusion in this court. (i)

And in another case where the plaintiff filed his bill to be relieved against a bond of £2,000 upon which the defendant had brought his action, setting forth that the bond was not entered into for money lent, or any valuable consideration, but purely to serve the defendant, and that it was agreed between them that it should not be put in suit. To prove which the plaintiff charged, that no demand had been made from 1703, when the bond was entered into, till the bringing of the action; that the plaintiff was a gentleman of a large fortune, and the defendant very necessitous; and that the defendant afterwards borrowed of the plaintiff £300 on bond; and that the bond being somehow lost, the plaintiff exhibited his bill in this court against the defendant, and had a decree for payment. The defendant in his answer says, 'that he does not know or believe that the plaintiff lost the bond, but believes that he fraudulently concealed or destroyed it.' To this the plaintiff objected, that it was scandalous and impertinent.

Upon which it was held, that though a matter may be scandalous in itself, it is not to be considered so if it is pertinent; or if the plaintiff asks impertinent questions, though the answer should be reflecting and impertinent, it would not be scandal. And it is very different to charge fraud and combination in a bill generally, and to insist upon it by oath in an answer. This bill is to be relieved against a stale bond; and, as an inducement to prove it satisfied, the plaintiff mentions the subsequent bond, proceedings, and decree in this court, in which case the defendant never insisted on being paid the money due by this bond he has now put in suit; and, therefore, it is to be presumed it was satisfied. All this is material to the case, but the plaintiff, in his manner of setting out this transaction, takes notice, that the bond being some way got out of his custody, obliged him to sue in this court, and the defendant, in his answer, says, he believes the plaintiff did not lose it, &c.; he denies what is not material; and what the plaintiff did not require him to answer. If he had alleged that he had lost it, and had questioned him to it, then his answer would not

(i) *Peck v. Peck*, Mosely, 45.

have been scandalous, though immaterial; because the plaintiff led him into it; but now he is impertinent for going out of the way purely to reflect on the plaintiff. (*j*)

And where, after the defendant had answered, and the plaintiff had amended his mere bill of discovery so as to pray relief, it was held, that the defendant could not put in a complete answer over again; and that if he did so, all that part of it which purported to be an answer to any thing beyond the amended bill might be expunged as impertinent. (*k*)

And where the object of the bill was to obtain an account, and as a means of relief to have an explanation of certain bills of costs and accounts, with the amount of which the plaintiff had been charged, and the plaintiff, for that purpose, had propounded to the defendant sundry very minute and particular interrogatories as to their nature; calling upon the defendant to specify, and shew how they were made out; and by what computation the result had been produced; or where the object was to ascertain the amount and the nature of the assets in the hands of an executor; and the interrogatories propounded asked him to state the amount of the assets which had come to his hands, with a particular account of their nature. And the defendant annexed to his answer a large and minute schedule of the items of his account, with a commentary of his own upon each item; or had appended to his answer a schedule which was, in fact, nothing more than a mere transcript of tradesmen's bills; or where the defendant, the executor, having sold the testator's household furniture by auction, set forth, in the schedule to his answer, a copy of the auctioneer's catalogue, with the description and price of every article.

It was held, that such schedules were altogether unnecessary and impertinent, notwithstanding the minute and special inquiries of the plaintiff, and were expunged accordingly; because they conveyed not the least degree of information upon the questions asked by the bill, the object of which was to have the heads of one claim and another so set out as to be informed how a particular balance had been produced; and because, although the plaintiff had pertinaciously insisted on a full disclosure; and therefore, after so insisting, could not object to the disclosure in ordinary cases; yet the defendant could not be justified in setting out all the items of a tradesman's bill, unless they were specifically called

(*j*) *Smith v. Reynolds*, Mosely, 70.—(*k*) *Hildyard v. Cressy*, 3 Atk. 303.

for as such ; and because it would be highly inconvenient to hold that, in answer to the common interrogatories a defendant should be justified in loading the parties with the expense that attends the setting forth all the minute particulars and prices in an auctioneer's catalogue ; since it would have been sufficient to state, that the furniture was sold by auction at such a time and place, by such a person, and had produced such a sum. And if a plaintiff really desires to be furnished with these minuter details he will have no difficulty in explaining his purpose by a special interrogatory. (1)

Hence it clearly appears, that a defendant, in making answer to a bill, cannot be permitted, in any manner, to stray beyond the confines of the case therein set forth ; or to bring within those limits any thing which can afford no degree of that information asked for by the bill ; or which can have no influence upon the case ; or which cannot be, in any way, needful to him as a defence against the claims and pretensions of the plaintiff. Upon these principles, in the case now under consideration, I cannot pronounce the various allegations of this answer, designated by the plaintiff as additional matter, to be entirely impertinent and foreign from the subject in dispute.

It is admitted, that the defendants have fully and sufficiently responded to all that has been asked of them by the bill. But the defendants having a right to set forth the matters on which they mean to rely as a defence against the plaintiff's claim have done so ; and it is against those positions of the answer, that all the plaintiff's objections have been directed. These defendants, in the suit at law, have relied upon the plea of *plene admistravit* ; and in their answer to this bill they do, in effect, shew how they mean to sustain that plea. They here state, as the substance and foundation of their defence, that they had reasonable ground to presume, that the claim of the plaintiff had been satisfied, or abandoned, arising from the length of time during which the dispute had loitered or slumbered in the court of law ; from no demand having been made upon them, after they had given notice by publication according to law, which notice had been repeatedly delivered into the house of the plaintiff's testator, who had for many years resided near these defendants and their testator ; and before

(1) *Alsager v. Johnson*, 4 Ves. 217 ; *Norway v. Rowe*, 1 Meriv. 347 ; *Beaumont v. Beaumont*, 5 Mad. 51.

a distribution of the surplus had been made among his next of kin. (*m*) It is true, that these matters might, without danger of inaccuracy, have been sufficiently set forth in a more condensed manner and with fewer words; but I cannot consider them as irrelevant, or say that they have been so very diffusively set forth as to amount to impertinences which should be expunged.

But these defendants have exhibited, as a part of their answer, a copy from the records of the Orphans Court of their second administration account, and of the distribution of the surplus of their intestate's estate. This I hold to have been wholly useless and unnecessary; because their administration accounts, or the mode in which they had administered the estate of their intestate, was in no way questioned, or called for by the bill; nor were any such matters involved in the controversy to be determined by the suit at common law, in relation to which dispute alone they were interrogated by the plaintiff. This copy of the account from the Orphans Court must therefore be expunged from this case.

The plaintiff has also objected to what the defendant *Mary* has said in relation to the freight; because what she states could, at most, amount only to a verbal agreement, and the contract of the parties was in writing.

This allegation made by the defendant *Mary*, in the joint and several answer of these defendants, is evidently introduced as an avoidance of so much of the plaintiff's claim; and therefore, could be of no weight on any prayer for relief here; unless sustained by proof. And if offered to be so established, the question would then arise, whether such proof should not be rejected so far as it was attempted to be relied on as giving an interpretation to a written contract; or whether it would not be admitted upon the ground, not of construing, but as an addition to, or alteration of a written agreement.

If the defendant *Mary* were offered as a witness, to prove the facts she states, it might be objected, that she was incompetent; because of having been, at the time she obtained a knowledge of the facts of which she speaks, the wife of the party as to whose contract she testifies; as husband and wife are incompetent witnesses for or against each other, as to all matters occurring during the marriage, as well after as during the coverture. (*n*) If, however,

(*m*) *Boydell v. Drummond*, 11 East. 144, note; *Leeson v. Holt*, 2 Com. Law Rep. 349; *Wright v. Pulham*, 18 Com. Law Rep. 271.—(*n*) *Nelius v. Brickell*, 1 Haywood's Rep. 19; *Doker v. Hasler*, 21 Com. Law Rep. 416.

this was a bill for relief here, and this case was set down for hearing on bill and answer, then this allegation, in the answer of the defendant *Mary*, would be taken for true, although she might be deemed incompetent to testify to the fact as a witness. (o) But as to the relevancy, legality, and competency of any testimony brought out by a bill of discovery, it does not belong to this court to decide; because such questions can only be determined, with propriety, by the court of common law for whose use the discovery has been required. (p)

It is a general rule, that on a bill of discovery the plaintiff must pay to the defendant all his costs in this court; and that too, including all expenses incurred by the defendant in resisting motions made in the case by the plaintiff. And the defendant's right to make his demand, accrues as soon as he has answered, allowing to the plaintiff a reasonable time to look into the sufficiency of the answer. But it has been thought that this rule is too general; that it ought, at least, to be so modified, as that the plaintiff should not be bound to pay costs where, upon demand, the defendant had refused voluntarily to make the requisite disclosures, so as to compel the plaintiff to come into this court, and incur the expense of a bill of discovery. It certainly does seem to be reasonable, even although the plaintiff should be ordered to pay the costs of this court in the first instance; yet that they should await the event of the suit at law, and be taxed there like the costs for summoning witnesses, &c. as a part of the costs of the suit at common law. (q)

The act of Assembly declares, that in deciding on exceptions to answers, the court may award costs to the party prevailing; (r) by which the question of costs seems to have been submitted entirely to the discretion of the court, in all such cases, without distinction. In the exercise of that discretion, therefore, I cannot but think it as reasonable, on a mere bill of discovery, as on a bill for relief, where the plaintiff has been put to the expense and trouble of extracting a sufficient answer from the defendant, or of pruning away its impertinences, that he should have, at least the costs of the exceptions; and therefore I shall give such costs in this case.

(o) *Lenox v. Prout*, 3 Wheat. 527.—(p) *Bishop of London v. Fytche*, 1 Bro. C. C. 98; *Hindman v. Taylor*, 2 Bro. C. C. 8.—(q) *Cartwright v. Hately*, 1 Ves., jun., 292; *Weymouth v. Boyer*, 1 Ves., jun., 423; *Simmonds v. Lord Kinnaid*, 4 Ves. 746; *Hindman v. Taylor*, 2 Bro. C. C. 10; *Noble v. Garland*, 1 Mad. Rep. 343; 1 Mad. Pra. Chan. 216; *Grant v. Jackson*, Peake's Cas. N. P. 204.—(r) 1820, ch. 161, s. 8.

Whereupon it is *Ordered*, that the last one of the exceptions of the plaintiff to the said answer, be and the same is hereby allowed; and that the said exhibit which the defendants have prayed to be taken as a part of their answer, purporting to be a copy of the second administration account of the defendants, and the distribution of the surplus of their intestate's estate, be expunged from the proceedings in this case; that all the other exceptions of the said plaintiff to the said answer be overruled. And that the defendants pay to the plaintiff all the costs of the said exceptions, including a solicitor's fee, to be taxed by the register.

McKIM v. ODOM.

If the plaintiff brings on the case for hearing on bill and answer, he thereby admits the answer to be true.—The bill dismissed as to some of the defendants, and relief granted against others.—A decree to account.—Where evidence is to be taken, a reasonable time to collect it is allowed as of course.—After an appeal had been taken, the plaintiff, on dismissing his appeal, allowed to amend his bill, on which a new injunction was granted on terms.

Three kinds of corporations, in reference to their objects; the nature of each considered.—How a corporation may sue or be sued; and to what actions it may be liable.—The proceedings against a corporation to enforce an answer, or obedience to a decree.

The proceeding by publication, on the ground that the defendant does not reside in the state, does not apply to those, such as mariners, who are temporarily absent in their vocation.—There can be no substituted service of a *subpœna* to answer an amended bill upon a solicitor, as against a resident defendant.

THIS bill was filed on the 23d of June, 1827, by *William S. Moore* and *John McKim, junior*, against *John Odom*, *George Law*, *William G. Harrison*, *William F. Anderson*, and *The President and Directors of the Franklin Bank of Baltimore*. The bill states, that the plaintiff *Moore* and the defendant *Odom*, being joint and equal owners of the schooner *Beauty*, sent her on a voyage from Baltimore to Montevideo, under *Odom* as master; that, for the better management of the concerns of their vessel, they employed the defendants *Law & Harrison*, then partners in trade, as her ship's husband; that it was agreed by these owners, before their vessel sailed, that she might be sold, and she was sold accordingly, at Montevideo, for about \$12,000; and there were remitted in specie, by the United States ship *Cyane*, as a part of the proceeds of sale, about \$9,000, with a bill of lading for the defendant *Law*;

that on the 10th of April, 1826, the plaintiff *Moore* assigned all his interest in the schooner and her earnings to the plaintiff *McKim*, of which *Law* was duly notified; that afterwards and immediately on the arrival of the ship *Cyane*, the defendant *Law*, by means of his bill of lading, obtained possession of the specie remitted, had it exchanged in Philadelphia, and thence transmitted to Baltimore, where he had the greater part of it deposited in *The Franklin Bank*, in the name of the defendant *Anderson*, in trust for his, *Law's*, use; that the object of the defendant *Law* in withholding, and thus secretly depositing the proceeds of sale, was fraudulently to compel the plaintiff *McKim* to submit to certain unjust and improper charges, which he, *Law*, as ship's husband, claimed a right to have allowed and deducted from those proceeds. Upon which the plaintiffs prayed relief and an injunction to stay the money so deposited in the hands of the bank. An injunction was granted accordingly.

The defendants answered separately. *Odom* averred, that the specie which he had remitted by the *Cyane* to *Law*, was not made up exclusively of the proceeds of the sale of the schooner and her earnings; but consisted, in a considerable part, of the proceeds of the sale of certain merchandise in which the plaintiffs had no interest, as was shewn by an account of *Zimmerman, Frazier & Co.*, which he exhibited as a part of his answer; and he also averred, that it had been agreed between him and the plaintiff *Moore*, then the half owner of the vessel, before she sailed, that all remittances should be made to the defendant *Law*, as ship's husband, who had made sundry disbursements for the use of the vessel, which he had a right to have allowed and repaid to him accordingly; and this defendant denied all the charges of fraud, &c.

The defendants *Law & Harrison* answered to the same effect; and positively denied the secret and improper disposition of the specie received from the *Cyane* as charged; and averred, that it was not held by the defendant *Anderson* for his, *Law's*, use, as stated.

The defendant *Anderson* averred, that the sum deposited in the bank was exclusively and properly his own; and he positively denied all combination and fraud as charged in the bill.

And the bank in their answer averred, that the sum stood on their books as a deposit belonging to the defendant *Anderson*, and that they had no knowledge of any other circumstances mentioned in the bill.

Upon these answers the defendants gave notice of a motion to dissolve the injunction, which coming on to be heard, the injunction was on the 15th of October, 1827, dissolved. From which order the plaintiffs appealed. By a note in writing, dated on the 7th of April, 1828, from *W. H. Marriott*, one of the solicitors of the plaintiffs, addressed to the register, he says, that after a careful examination of *Law's* answer, they had determined to submit the case on bill and answer. The general replication, which had been filed, having been thus withdrawn, the case was accordingly submitted for hearing on bill and answer.

14th April, 1828.—*BLAND, Chancellor*.—This case having been set down for hearing by the plaintiffs upon the bill and answers thereto alone; and having been submitted on their part without argument; and the solicitors of the defendants having on the 28th of March last filed a note in which they say, that ‘the counsel for the defendants having understood that this case is set down for hearing at the present term; and that the object of complainants is to obtain against the defendant *Law* a decree to account. They, therefore, respectfully submit to the Chancellor, whether the complainants are entitled to any such decree; no such relief having been prayed in the bill, and no foundation having been laid for the same.’ Upon which the proceedings were read and considered.

One of the plaintiffs, *McKim*, as assignee of his co-plaintiff *Moore*, claims the one-half of the schooner *Beauty*, as tenant in common with the defendant *John Odom*. The plaintiffs complain that the defendants *Law*, *Harrison*, and *Odom*, have refused to account with them for the proceeds of this vessel, which has been sold, and her earnings. And by their bill pray, that one-half of those proceeds and earnings may be delivered over to them, or that they may have such other relief as is best adapted to the nature of their case.

When a case is set down for hearing, as this has been, on the bill and answers alone, every thing contained in the answers, including the exhibits which constitute a part of them, being prayed to be made so, are necessarily admitted by the plaintiff to be true in every particular, so far as it may be at all pertinent and applicable to the case set forth in the bill; because, if the plaintiff does not contest the answer by putting in a replication to it, he thereby admits it to be true; and even if he should have put in a replication; yet, if he afterwards, without laying the defendant under a rule to proceed, brings the case to be heard on bill and answer,

the answer must, in like manner, be taken to be true in all points; because the opportunity which the defendant had of proving his answer, is thereby as effectually taken from him as if no replication had been filed. (a)

It is also an established rule, that when any one of two or more defendants makes out a defence which goes to the whole case, as regards himself, at least, the bill must be dismissed; and where a complete bar as to the whole case is thus established by any one defendant; and there can be no relief granted against any one defendant without including all of them, the bill must be dismissed totally as to all. (b)

In the manner, and upon the principles on which this case has been presented to the court, its nature and extent must be collected chiefly from the answers. It is perfectly clear, that the *President, Directors and Company of the Franklin Bank of Baltimore*, and *William F. Anderson*, had not, at any time, any connexion or concern with this case, further than as the mere supposed holders of the identical proceeds of the schooner *Beauty*, and her earnings. Considered as such, they were properly enough made parties so far as any benefit was expected to be derived from an injunction. But the injunction which was granted, having been dissolved, they are now detained here for no purpose; their answers conclusively shew, that the plaintiffs can have no relief whatever against them; and, therefore, as to them, the bill must be dismissed.

As to the other parties, it is quite evident, that it will be impracticable to reach the justice of the case without an account; indeed it is what all seek as the only means of obtaining that to which each deems himself entitled. All that has been said about the nature, value, and proceeds of the cargo of the schooner *Beauty*, must be laid aside as foreign to the matter in controversy between these parties. *McKim* and *Odom* were tenants in common of this vessel; and as such, each of them is entitled to one-half of the net proceeds of the sale which has been made of her, and also to one-half of her freight and earnings on her voyage from Baltimore until she was sold. The firm of *Law & Harrison*, and *George Law*, are entitled by their contract with the owners of

(a) *Beam's Orders*, 29, 180; *Forum Rom.* 45; *Grosvenor v. Cartwright*, 2 Cas. Chan. 21; *Barker v. Wyld*, 1 Vern. 140; *Wrottesley v. Bendish*, 3 P. Will. 237, note; *Legard v. Sheffield*, 2 Atk. 377; *Paul v. Nixon*, 1 Bland, 201, note; *Estep v. Watkins*, 1 Bland, 488; *Wright v. Nutt*, 3 Bro. C. C. 340.—(b) *Lingan v. Henderson*, 1 Bland, 236; *Barker v. Wyld*, 1 Vern. 140.

this schooner, and by the nature of their agency, to retain so much of the proceeds of this vessel and her earnings, which have come to their hands, as will reimburse them for all disbursements and advances made by them, as well on account of her voyage to the West Indies as of that which she made to Montevideo.

The auditor, therefore, will so state the account as to shew the amount claimed for disbursements by the firm of *Law & Harrison*, and also by *George Law*. The amount of proceeds which came to the hands of *Law & Harrison*, of *George Law*, or of *John Odom*, if in fact any has been separately received by each, or any of them. The one-half of the net amount of the proceeds of this schooner and her earnings will be decreed to *McKim*, and the other half to *Odom*. Interest is to be estimated as usual on receipts and payments. The object of this account is to ascertain the exact amount to which *McKim* and *Odom* are, each of them, entitled; and of whom they are to obtain payment.

Whereupon it is *Decreed*, that as regards the *President, Directors and Company of the Franklin Bank of Baltimore*, and *William F. Anderson*, the bill of complaint be and the same is hereby dismissed with costs to be taxed by the register. *Decreed*, that the complainants and the defendants *George Law*, *William G. Harrison* and *John Odom*, account with each other of and concerning the disbursements made for the outfit and use of the said schooner *Beauty* on her voyage to the West Indies, and afterwards to Montevideo; and also as to the proceeds of the sale of the said vessel and her earnings, as in the proceedings mentioned. That the auditor state the account relative thereto from the evidence and proceedings in the case, and such other evidence as may be laid before him by either party. The said account to be returned to this court for further order, and subject to the exceptions of either party. And it is further *Ordered*, that the plaintiffs and defendants *Law*, *Harrison* and *Odom*, be and they are hereby authorized to take testimony before the commissioners in the city of Baltimore, to be used in stating the account as aforesaid, on giving three days notice as usual. *Provided*, that the same be taken and filed on or before the 15th of May next.

On the 12th of May, 1828, the defendant *Law*, by his petition on oath, stated, that the testimony of *William P. Matthews*, a witness competent and proper, who was then beyond the limits of the state, was necessary to sustain his case, &c. Whereupon

he prayed, that he might have a commission to take testimony; and that the time for collecting and returning evidence might be enlarged.

12th May, 1828.—BLAND, *Chancellor*.—*Ordered*, that the time limited for the returning and filing of testimony authorized to be taken by the interlocutory decree of the 4th of April last, be and the same is hereby extended to the 15th of October next. That the parties be and they are hereby authorized to take out a commission for the purpose of taking testimony in any foreign country, to be read in evidence in this case, on naming and striking commissioners as usual. *Provided*, that such commission be returned on or before the 15th of October next; or that good cause be then shewn why the same, with reasonable diligence, could not have been returned by that time.

Soon after which the plaintiffs, by their petition on oath, stated various matters and things in relation to the grounds upon which this last order had been granted; and objected to the enlargement of the time for collecting and returning testimony; alleging, that the sole object of the defendant *Law*, was an unjust and unreasonable delay. Upon which they prayed, that the order of the 12th instant might be rescinded.

16th May, 1828.—BLAND, *Chancellor*.—The petition of the plaintiffs, this day filed, having been submitted, has been read and considered.

The time limited for taking and returning testimony in relation to the accounts directed to be stated by the interlocutory decree of the 14th of April last, was, as is usual in cases where there is nothing in the proceedings from which what may be deemed a reasonable time for that purpose can be inferred, and the parties have not been heard upon that subject, fixed at a very short period. And therefore I did not consider it proper on the 12th instant to exact from the party, on that, his first application for an extension of the time, such strict proof of the necessity of having it enlarged, as I should have done on a second application of the same nature, or as would be required to obtain the continuance of a case standing regularly for hearing; therefore it is *Ordered*, that the aforesaid petition be and the same is hereby dismissed with costs.

On the 20th of June, 1828, these plaintiffs filed another bill against these same defendants, in which the ownership, voyage,

and sale of the schooner *Beauty*, is set forth as in the first bill; and after stating as before, that the proceeds of sale were remitted by the *Cyane*, the plaintiffs aver by this bill, that the specie was received from the *Cyane* by the defendant *Anderson*, as the agent of the defendant *Law*; and that *Anderson* had carried it to Philadelphia, and covertly transmitted the whole or the greater part of it thence to Baltimore, where he had fraudulently deposited it in the *Franklin Bank* in his own name. The particulars of which alleged fraudulent transactions are fully described in the bill, in which it is alleged, that they were not known to the plaintiffs when they filed their first bill. And it is further alleged, that the defendant *Law* is insolvent and unable to pay his debts; and that the defendant *Harrison* had been actually discharged under the insolvent law. Whereupon the plaintiffs prayed, that upon the dismissal of their appeal from the order of the 15th October last; and of their bill filed on the 23d of June, 1827, an injunction might be granted upon this bill to prevent the proceeds from being removed from the bank in which they had been deposited by the defendant *Anderson*; and for general relief, &c.

20th June, 1828.—BLAND, Chancellor.—I would have it distinctly understood, that I disclaim the power to pass any order relative to a subject matter appealed from, pending an appeal by virtue of which the power of this court, in relation to such subject, may or can be decided by the Court of Appeals, to have been suspended. But I am of opinion, not however without some doubt, that I may be allowed, pending an appeal from an interlocutory order dissolving an injunction, made on the bill and answer alone, to grant another injunction upon a bill in nature of an amended bill between the same parties, to be issued after such dismissal or termination of the appeal, as leaves the injunction dissolved according to the order appealed from. In this case however, it appears to me to be fit and proper, in order to prevent a vexatious renewal or continuance of the injunction on a state of facts which has been already considered and adjudicated upon; that the bill this day filed, and now submitted, should be considered as an amendment to that filed on the 23d of June, 1827; and that it should be so taken and answered accordingly. But as it appears, that the new facts set forth in this bill are chiefly, or altogether within the knowledge of the defendants *Law*, *Harrison*, and *Anderson*, it is therefore reasonable, that the injunction, to be issued after the termination of the appeal, should be subject to a motion

for a dissolution on the coming in of their answers thereto alone, in connexion with all the previous proceedings. (c)

Therefore it is *Ordered*, that upon the fact of the dismissal of the said appeal, or other final termination thereof, whereby the said injunction may be dissolved, being certified to the register of this court, an injunction be issued as prayed by the aforesaid bill of complaint. And that *subpœnas* now issue as in case of an amended bill. And it is further *Ordered*, that at any time after the defendants *Law, Harrison, and Anderson*, shall have filed their answers to the said bill, the court will hear a motion to dissolve the said injunction granted thereon; *Provided*, that ten days notice thereof be given to the said complainants. And it is further *Ordered*, that a copy of this order be endorsed upon or served with the said writ of injunction hereby directed to be issued.

The appeal having been dismissed, an injunction was accordingly issued as authorized by this order. After which the defendants *Law, Harrison, and Anderson*, put in their answers separately to this amended bill, in which they fully explained all the circumstances of the case, and positively denied the fraudulent transactions as charged. The defendant *Law* denied that he was in a condition of insolvency; but the defendant *Harrison* admitted that he had obtained the benefit of the insolvent laws. Upon these answers these defendants moved, according to the terms of the order of the 20th of June, to dissolve the injunction.

4th September, 1828.—BLAND, *Chancellor*.—The motion for the dissolution of the injunction heretofore granted in this case, standing ready for hearing, the solicitors of the parties were fully heard, and the proceedings read and considered.

Upon the hearing of this motion, two affidavits were offered and heard with a reservation as to the propriety of their being thus introduced for any purpose. But since it is quite evident that they have no material bearing upon the question now to be decided, I deem it entirely unnecessary to express any opinion as to the admission of such affidavits, under any circumstances, upon the hearing of a motion to dissolve an injunction.

Whereupon it is *Ordered*, that the injunction granted by the order of the 20th of June last, be and the same is hereby dissolved.

The plaintiffs by an application charged that the defendant *Odom* had left the state, and prayed leave to amend their bill, stating that fact, and praying an order of publication against him. Leave being granted, the amendment was made accordingly. Whereupon, on the 15th of September, 1828, an order of publication was passed, warning him, 'as being at that time out of the state,' to appear and answer on or before the 15th of February then next. But the court on further consideration refused to proceed on this as against a non-resident defendant.

On the 12th of December, 1828, the plaintiffs by their petition, stated, that *The President and Directors of the Franklin Bank of Baltimore*, had been regularly returned summoned; and had refused to answer the amended bill. Whereupon the plaintiffs prayed, that a *distringas* might be issued against that corporation.

5th January, 1829.—BLAND, Chancellor.—A plaintiff has a right to an answer to his bill from the defendant; the mere taking of a bill *pro confesso*, may not, in all cases, serve his purpose; but if the defendant is beyond the jurisdiction of the court, the plaintiff can obtain no more, and must therefore help out his case as he can. If the defendant be within reach he may be compelled to answer, and the plaintiff is entitled, as of course, to the coercive process of the court, for the purpose of forcing his opponent to make a full answer to all the material allegations of his bill. The mode of proceeding against contumacious *natural* persons who neglect or refuse to answer, is well established and sufficiently energetic; but the course of proceeding for that purpose against artificial bodies or corporations, is different, more feeble, and much more tardy; there being no legislative provision for enforcing an appearance or answer from such defendants. (*d*)

So far as I have been able to ascertain, this is the first instance of an application to this court for coercive process against a body politic. Corporations have latterly become very numerous; and new ones are created at almost every session of the Legislature; the matter now submitted for determination, therefore, has an importance much above the interests of the case out of which it

(*d*) It has been since declared, 'That any process issued by any court of this state against an incorporated company, holding and exercising franchises within said state, may be served upon the president, or any director or manager, or other officer of such company, with the same effect as if such process were served on the president and directors, or a majority of them; and such process shall be deemed to every effect, service upon said corporate body.'—1832, ch. 306, s. 5.

arises, and requires to be carefully considered with a view to the course of proceeding in future.

Under the provincial government, corporations were framed and called into existence, as in England, either directly by or with the immediate sanction of the lord proprietary or the monarch. (e)

(e) 1 Blac. Com. 472; The case of Sutton's Hospital, 10 Co. 23.

CÆCILIUS, absolute lord and proprietary of the provinces of Maryland and Avalon, lord baron of Baltimore, &c. To all our officers and inhabitants of our said province of Maryland, and to all others whom these presents may concern, sendeth greeting, in our Lord God everlasting. Know ye, that whereas by our letters patent, under our great seal, bearing date the third day of November, in the seven and thirtieth year of our dominion, *Annoque Domini* one thousand six hundred and sixty-seven; we did grant to our well-beloved inhabitants within the city called or known by the name of St. Mary's city, in the county of St. Mary's, in the said province of Maryland, and the circuits, precincts, and privileged places of the said city, not exceeding the space of one English mile square, that they the said inhabitants, within the said city, circuits, and precincts aforesaid, shall be an incorporated city of one mayor, one person learned in the law, by the name of recorder, and six aldermen, and ten persons as common councilmen, inhabiting within the said city, for evermore. And that the said mayor, recorder, aldermen and common councilmen, shall be a body corporate and one community forever, in right and in name; and shall be, by the name of mayor, recorder, aldermen and common council of the city of St. Mary's city, able and capable at law to be sued and to sue; and to act, execute, and do as a body incorporate; and to have succession forever; and to that end to have a common seal; and that Philip Calvert, Esquire, one of the inhabitants of the said city, shall, for the present, be and be named mayor of the said city, for the ensuing year, and John Morecroft recorder of the same, and William Calvert, Esquire, Jerome White, Esquire, Daniel Jenifer, Garrett Vanswearingen, Mark Cosden, and Thomas Cosden, inhabitants also of the said city, shall be aldermen thereof as long as they shall well behave themselves therein, having first taken the oath of fidelity, as also the oath appointed by us to be taken by the mayor, aldermen and recorder of the city of St. Mary's city; and to be administered unto them respectively by our lieutenant of the said province, for the time being; or by such person or persons as we, or our heirs, or our lieutenant of the said province, for the time being, shall from time to time authorize and appoint to administer the same. And the said mayor, recorder and aldermen, or the major part of them, shall elect and chuse ten others of the most sufficient inhabitants of the said city to be of the common council thereof, for so long time as they shall well behave themselves.—*Chancery Proceedings, lib. C. D. fol. 54.*—This body politic has long since been dissolved by desuetude.

Some time after the city of St. Mary's had been thus incorporated, Ann, Queen of England, who then held the government of the province of Maryland, granted a charter incorporating the city of Annapolis.—*Chancery Proceedings, lib. P. C. fol. 590; 1708, ch. 7.*

The charter of the city of St. Mary's affords an example of what, in England, are called *close* corporations; that is, where the major part of the persons to whom the corporate powers have been granted, on the happening of vacancies among them, have the right of themselves to appoint others to fill such vacancies, without allowing to the inhabitants or corporators, in general, any vote or choice in the selection of such new officers. An *open* corporation of a city, &c., is where all the

But however they may have been originated formerly or elsewhere, it is certain that they can now only be established here by the authority of the Legislature. The multitude of bodies politic, that have been created either by the government of the province or of the Republic, most of which still subsist, may be considered, in reference to their objects, as belonging to one or other of three distinct classes.

The first kind are such as relate merely to the public police; which, by assuming upon themselves some of the duties of the state, in a partial or detailed form, and having neither power nor property for the purposes of personal aggrandizement, can be considered in no other light than as the auxiliaries of the government of the Republic; and consequently, as the secondary and deputy trustees and servants of the people. The right to establish, alter, or abolish such corporations, seems to be a principle evidently inherent in the very nature of the institutions themselves; since all mere municipal regulations must, from the nature of things, be subject to the absolute control of the government. These institutions being, in their nature, the auxiliaries of the government in the great business of municipal rule, cannot have the least pretension to sustain their privileges, or their existence upon any thing like a contract between them and the government; because there can be no reciprocity of stipulation; and because their objects and duties are incompatible with every thing of the nature of such a compact.

The power of acquiring and holding property, although almost always given, is by no means a necessary incident to corporations of this class; they may be established without any such capacity; as in the instance of the commissioners for emitting bills of credit. (f) The preservation of morals, and the administration of justice are the chief ends for which government has been instituted; and infancy, insanity, infirmity, and helpless poverty have an undoubted claim upon the protecting care of the Republic. (g) Bodies politic of this class having these objects in view, are city

citizens or corporators have a vote in the election of the officers of the corporation. Every one here, however, must have observed, that although we have, in this state, at present, no *close* corporations so constituted by their charter, there are, nevertheless, many instances where so many proxies, of those who alone have a right to vote, are gathered into a few hands, as, in practice, to make such bodies politic *close* corporations, by means of which their then president and directors are continued in office.

(f) 1769, ch. 14, s. 6.—(g) Montesq. Sp. Laws, b. 23, c. 29.

corporations; (*h*) levy courts; (*i*) county schools of the provincial or state government; (*j*) public colleges; (*k*) hospitals; (*l*) trustees of the poor of the several counties; (*m*) &c.

The second class of corporations are such as have no concern whatever with the duties of the Republic; nor are in any manner bound to perform any acts for its benefit; but whose only object is the personal emolument of its members. The corporators in such institutions may also, in some sense, be considered as trustees; but then, even in that character, they are the mere factors of individuals; and, therefore, their resignation or removal cannot divest or alter any of the rights of the individuals they represented. Each member of such an aggregation either was a proprietor at the commencement, or became so during the existence of its incorporation; and consequently, unless he has aliened his right, must continue to be so after its dissolution. A corporation not being, like a natural person, one of the elements of society, of which government is formed, can only be considered as a creature of the law. It is the law alone which gives to it a personality distinct from that of each of its members, and confers on it the right to act by its president, directors, or agents, in a manner analogous to that in which the government itself acts by its regularly constituted functionaries. This individuality of character, and the right so to act is, then, nothing more than a portion of the power of the government with which it has been invested. It is this power which is given by the creation of a body politic, and which, by its extinguishment, is resumed, and nothing more; the rights of property vested in its several members, in all other respects, remain unaffected by its dissolution.

It is remarkable, that there is no instance of the creation of any body politic of this description under the provincial government; but since the establishment of the Republic they have increased and multiplied to a very large and still rapidly growing family. The examples of this class of corporations are the insurance companies; (*n*) the Free Mason societies; (*o*) the banks; (*p*) the manufacturing companies; (*q*) the library companies; (*r*) &c.

The third species of corporations partake, in many respects, of

(*h*) 1708, ch. 7; 1796, ch. 68.—(*i*) 1804, ch. 73.—(*j*) 1696, ch. 17; 1723, ch. 19.—(*k*) April, 1782, ch. 8.—(*l*) 1797, ch. 102; 1816, ch. 156.—(*m*) 1768, ch. 29; 1785, ch. 15.—(*n*) April, 1787, ch. 20.—(*o*) 1821, ch. 147.—(*p*) 1790, ch. 5.—(*q*) 1808, ch. 49.—(*r*) 1797, ch. 35.

the nature of the two first classes; and are such as have a concern with some of the expensive duties of the state, the trouble and charge of which are undertaken and defrayed by them, in consideration of a certain emolument allowed and secured to their members. In cases of this kind there is certainly many of the material features of a contract between the government and the corporation; there is manifestly a *quid pro quo*. But this contract, if it be so, is, and of necessity must be, like all others to which a government or state is a party, one of imperfect obligation as regards the state; (s) and, as such, subject to be dealt with by the government of the state as the public good may require, on making a just compensation for any private property which may be taken for a public use. No bodies politic of this description were ever created under the provincial government; but since our independence, a great number of them have been called into existence; such as canal companies; (t) bridge companies; (u) turnpike road companies; (w) &c.

The right and capacity to sue and be sued, is an incident to bodies politic of all descriptions; (x) even to those which have been incorporated by and are located in another state or in a foreign country. (y) It is held to be incumbent upon every body politic, not being incorporated by a public law of which the court

(s) Vattel Law Nation. Prelim. s. 17.—(t) November, 1783, ch. 23.—(u) 1795, ch. 62.—(w) 1797, ch. 65. In regard to the irrepealable nature of an act of incorporation, it may be well not only to bear in mind the distinctions, as explained above in the text, according to which it is quite obvious, that at least two out of the three kinds of corporations, there described, may be modified or repealed at the pleasure of the legislature, without the slightest interference with the rights of private property of any kind. But that there must also be a variety of cases in which corporations of the third class, such as turnpike roads, may have their stock, even considering it as private property, indefinitely depreciated, or, in effect, totally annihilated, without, in the opinion of any one, giving rise to a claim for compensation, as in cases where mere private property is taken, by virtue of the government's power of *eminent domain*, for public use. Without going into an argument, it will be sufficient to state a case which has occurred. By the act of 1812, ch. 78, the legislature incorporated a company for making a turnpike road from Baltimore to Washington; under which the road was made, and the stock yielded a considerable dividend annually. After which the legislature, by the act of 1830, ch. 158, authorized the construction of a rail road between the same cities, and nearly parallel with the turnpike road, which was accordingly put in operation. In consequence of which the annual dividends on the stock of the turnpike road have been very materially diminished.—*Currie v. The Mutual Assurance Society*, 4 Hen. & Mun. 315.

(x) 1 Blac. Com. 475.—(y) 1 Blac. Com. 385; 4 Com. Dig. 487; *Henriques v. Dutch West India Company*, 2 Ld. Raym. 1532; *The National Bank of St. Charles v. De Bernales*, 11 Com. Law Rep. 475.

is bound to take notice, which comes into a court of justice as a plaintiff, if required, even upon the general issue only being pleaded, to shew the authority under which it has assumed to act as a corporation. (z) When called on as a defendant its corporate capacity is thus admitted, and it appears by attorney, and responds under its seal, or in the manner specially prescribed to it. (a) But there is no legislative enactment which directs in what mode a corporation of any kind may be compelled to answer in case it should neglect or refuse to do so.

It is admitted on all hands, that in a suit against a corporation none of its members can be taken or personally punished, except, perhaps as a last resort, on account of any contumacy in their corporate capacity. The only mode of proceeding, either to enforce an answer or obedience to a decree is by a *distringas* and sequestration of the property of the body politic. (b) The state itself is regarded in many respects as a mere body politic; (c) and in the various instances where it becomes necessary to have it made a party to the litigation, it is represented by its Attorney-General; in which cases, the course of the court merely allows, that he should be attended with a copy of the bill; but he cannot be forced to answer in any manner whatever; (d) and therefore, if the bill cannot be taken *pro confesso* against the state, (e) the further progress of the case must await his good pleasure.

Every corporation is and must be composed of, and conducted by natural persons; yet the distinction between the natural and artificial capacities and liabilities of its members has been drawn in such a manner as to create the most serious inconvenience. A body politic, it has been quaintly said, has no soul; and therefore cannot be called on to answer under the obligation of an oath by which a natural person may be bound. (f) To avoid this difficulty the Court of Chancery has had recourse to a singular shift; which it is admitted rests on very questionable principles; it allows the secretary, book-keeper, or some one or more of the chief members of the body politic to be made co-defendants for the express purpose of obtaining an answer on oath; which answer, contrary

(z) 4 Com. Dig. 487; *McMechen v. The Mayor of Baltimore*, 2 H. & J. 41; *Agnew v. The Bank of Gettysburg*, 2 H. & G. 479.—(a) 1804, ch. 73, s. 6.—(b) *Bac. Abr. tit. Corporations*, E. 2; *Lynch v. The Mechanics' Bank*, 13 Johns. 127.—(c) 1785, ch. 36.—(d) *Willis Eq. Plea*. 7.—(e) 2 *Mad. Pr. Chan.* 335; 1 *Fowl. Exch. Pra.* 401; *Nabob of the Carnatic v. The East India Company*, 1 *Ves., jun.*, 371; *S. C.* 1 *Hoven. Supp.* 149.—(f) *The case of Sutton's Hospital*, 10 *Co.* 33.

to the general rule in other cases, is received as evidence against the corporation itself. (g) Thus allowing the plaintiff to select from among the corporators such one or more of them as he may think proper to make witnesses, and to extract from them only such proof as may be entirely responsive to his case.

It is now settled, that a corporation may be charged in actions *ex delicto* as well as *ex contractu*, notwithstanding the general rule, that they can only act and bind themselves by means of their corporate seal. For although the members of the body politic, in their corporate capacity, cannot commit a crime, or perpetrate a felony; yet, since the institution is governed by the intellectual agency of natural persons, they may cause it so far to depart from the purposes of its establishment, as, by means of its servants to commit a trespass, or tort, or unlawfully to refuse to make compensation for that by which it had been, upon its own request, materially benefited; and, therefore, redress is allowed to be had against it by an action of trespass, trover, or assumpsit, as may be best suited to the true nature of the case. (h)

The adjudications by which these modes of proceeding have been sanctioned, manifest a sensible and strong disposition in the courts of justice, so to control and modify the ancient distinction between the artificial and natural capacities of those of whom corporations may be composed, as to prevent them from withholding a disclosure of the truth; or from perpetrating wrong and fraud, under cover of their artificial capacity; because of the quaint notion that, as such, they have no soul; or because, in general, they can only act, or bind themselves in the manner prescribed by means of their corporate seal.

On the other hand it may often become necessary to proceed personally against the officers and members of a body politic, who have been entrusted with its concerns, so as to prevent them from exposing its property to seizure and loss by reason of their negligence or contumacy. In a suit against a body politic, which can only be considered as an auxiliary of the government of the Republic, it would certainly be very unjust to seize upon its pro-

(g) *Fenton v. Hughes*, 7 Ves. 289; *Dummer v. Corporation of Chippenham*, 11 Ves. 253.—(h) *Com. Dig. tit. Franchises*, F. 19; *Yarborough v. The Bank of England*, 16 East. 6; *The Bank of Columbia v. Patterson*, 7 Cran. 299; *McDonough v. Templeman*, 1 H. & J. 156; *The Bank of the United States v. Norwood*, 1 H. & J. 423; *Kennedy v. The Baltimore Insurance Company*, 3 H. & J. 367; *Union Bank of Maryland v. Ridgely*, 1 H. & G. 419.

perty, and stop or embarrass its operations, merely for the purpose of compelling its mayor, president, or directors, to answer to a suit which had been brought against it. Indeed it would, in most instances, be doing a gross injury to the public, only as a means of reaching and coercing a delinquent corporator, whose separate and personal interests could not be at all affected by any such proceeding. For, the mayor and council of a city; the justices of a levy court; the governors and visitors of a college; the president and directors of a hospital, or the trustees of the poor, could not have their private interests, in any manner, affected by the most destructive sequestration that could be made of the corporate property which they held in their artificial capacity. Even with regard to bodies politic of the second class, whose sole object is the aggrandizement of their own members, it certainly must be admitted to be unjust to injure all, by an indiscriminate sequestration, merely because some one, or a few of their members have been negligent, or contumacious, in not answering to a suit as was required.

But as regards bodies politic of the third class, who collect for their members private emolument from a public benefit, these and other evils and embarrassments must arise from a rigid adherence to the notion that such a corporation can only be forced to respond to a suit against it by a *distringas* and sequestration of its property. Take the case of a turnpike road company, that had refused to answer a bill in Chancery. The road itself could not be taken and closed by virtue of a *distringas* or sequestration; because that, as one of the highways of the Republic, could not, nor ought not to be obstructed by any process whatever against those whose only interest in it is the toll they are allowed to exact in consideration of keeping it in repair. Consequently, in this instance, the only method by which the court could effectually levy upon its property, as a means of enforcing an answer, would be to appoint a sequestrator, or receiver, to take the place of the company's toll-gatherer at each gate along the whole line of the road. (i)

The injury or ruin which might be brought upon a body politic by the negligence or contumacy of its officers, as well as the great delay and embarrassment in the administration of justice, that must arise from confining the tribunal, before which it is sued,

(i) Knapp v. Williams, 4 Ves. 430, note; Adley v. The Whitestable Company, 17 Ves. 324; S. C. 1 Meriv. 108; *Ex parte Fowlser*, 1 Jack. & Walk. 73, note; Drewry v. Barnes, 3 Cond. Cha. Rep. 311.

exclusively to the use of the process of *distringas* or sequestration, as the only means of enforcing an answer, is most manifest. To prevent this injury in a case which occurred in England, in the year 1776, where the *warden* of a body politic refused to affix the corporate seal to its answer, the Court of Chancery, in mercy to the acquiescing parties, staid its process of contempt, by which the whole corporation at large would have been affected and punished, by a seizure of their property, until the acquiescing members of the body politic could obtain from the Court of King's Bench, a *mandamus* to compel the contumacious warden to affix the seal to its answer. (*j*)

It is one of the most valued principles of our government, and of the common law, that all men hold their situations, in this country, upon the terms of submitting to have their conduct examined and measured by that standard which the law has established; (*k*) and that all trustees or fiduciaries appointed for the public good, or who are entrusted with the management of the affairs of a body politic, should be within reach of the law; and in some form or other responsible, and made to perform their duty. Upon this ground, where the justices of an inferior court, or the officers of a corporation, fail to give judgment, or to discharge their duty, they may be compelled to do so by a *mandamus*. The superintending authority does not by its *mandamus* deprive them of any of their discretionary power, but merely commands them to execute their duty, to render judgment, or to make answer as they may think proper, to the end that the individual may have an appeal, or prosecute his suit to a final decision, or obtain the relief he seeks. (*l*) Why should not an immediate power, to this extent, in the shape of an attachment against the person, be vested in every court of justice, before which a public officer, or a body politic, may be called as a defendant? The important concerns of the public, or the rights of individuals, or of corporations, most certainly ought not to be suffered to be delayed, obstructed, or destroyed by the mere indolence, caprice, or perverseness of any one.

These difficulties and inconveniences are sufficient to shew, that a body politic ought not, in any case, to be made a defendant, unless it is indispensably necessary to do so. But there are instances, many of which have already occurred in this court, and of which this suit affords an example, where, as the law now stands,

(*j*) *Rex v. Windham*, Cowp. 377.—(*k*) *Sutton v. Johnstone*, 1 T. R. 504.—(*l*) *Bac. Abr. tit. Mandamus*, D.

a corporation must be made a party to the suit, although it has, in truth, not the least concern with the matter in dispute. Thus where the plaintiff claims a right to a sum of money deposited in a bank, or to certain shares of stock which stand on the books of the company in the name of the defendant who claims the deposit or the shares as his own, or as having an interest in it, or them, the body politic, it is held, must be made a party to prevent the deposit or the shares from being paid away, or transferred, before the right can be determined. This, with the vast concerns of the bank, the East India, and the South Sea companies of England, had become an evil of such magnitude, that the parliament of that country interposed, and declared by law, that in all such cases it should not be necessary to make them parties. (*m*) But why should not a similar exemption be extended to all our joint stock companies ; and a mere notice of the pending litigation be declared equivalent to making them parties for every purpose of preventing the parting with a deposit, or the transferring of the shares of its stock until the right to it was fully decided.

All these embarrassments and delays might be removed or prevented by a few very obvious and easy alterations in the course of procedure in suits where the state is required to be represented by its Attorney-General, and against corporations. Let it be declared, that on proof of the service of a copy of the bill upon the Attorney-General in any case where the state should appear as a defendant, he may be compelled to answer, but not on oath, by process of attachment as against other persons. That on a *sub-pœna* being returned served, the plaintiffs may obtain an attachment against corporators so summoned, or that the plaintiff may have an order of publication against a foreign corporation ; or have the bill taken *pro confesso* as against natural persons ; or that he may, in the discretion of the court, have an immediate sequestration of the property of the corporation. That in all cases the chief officer or principal members of the body politic, who have a knowledge, or who are charged with having a knowledge of the facts stated in the bill, should make oath to the truth of its answer, as if it were their own, and be subject to the like penalties. And that it should not be necessary, in any case, to make an officer or member of the body politic a co-defendant for the sole purpose of obtaining an answer on oath. And also, that the court should be

allowed, where the right to a deposit, or the stock of a company, was made the subject of controversy in any suit, to order the company to transfer or hold its stock, and to pay or hold dividends or deposits, as the justice of the case might require, by serving upon them a copy of such order without making them parties to the suit. These few alterations in the course of the procedure of this court, would save to all parties, in such cases, a deal of time, trouble, and expense, which is now unnecessarily wasted. (*n*)

When I consider that this is the first application of its kind; that there has been heretofore no regularly settled practice in this court in relation to bodies politic; and that it has a large, and almost unlimited control over its own rules of practice, (*o*) I feel tempted at once to make those evidently useful alterations as to the course of proceeding against corporations. But when, on the other hand, I recollect that it has been always considered as an established principle, that this court is confined, in all material particulars, to those forms of proceeding which have been settled by the Court of Chancery of England, from which it has deduced all its modes of acting; (*p*) and also, that this conformity to the ancient English course of proceeding, has been, in various ways, recognized and affirmed by legislative enactments, (*q*) I have become satisfied that it is safest and best to leave the matter to the General Assembly, who alone are competent to alter and shorten the process in Chancery, permanently and effectually. I shall, therefore, hold myself bound to adopt and apply the ancient and known writs and process of the English Court of Chancery, so far as they have not been altered or affected by the principles of our government; or the positive provisions of our laws, in the best manner that the nature and circumstances of the case will permit.

It is said, in one of the very respectable treatises on equity pleading, that 'in the case of a corporation aggregate, where the answer is under the common seal, the bill must pray, that a writ called a writ of *distringas*, may issue under the great seal, which is for the purpose of distraining them by their goods and chattels, rents and profits, until they obey the summons or direction of the court.' (*r*) What is here said, however, as to the prayer of the bill, is cer-

(*n*) Some alterations have been since made by the acts of 1832, ch. 306, and 1834, ch. 89.—(*o*) *Dicas v. Lord Brougham*, 25 Com. Law Rep. 382.—(*p*) *Digges' Lessee v. Beale*, 1 H. & McH. 71; *Ringgold's case*, 1 Bland, 18.—(*q*) 1785, ch. 72, s. 25 and 26; *Collyer on Partn.* 412.—(*r*) *Coop. Pl. Eq.* 16.

tainly wrong; the authorities cited warrant no such assertion. (s) And it has also been said, that a *subpæna* is not the proper original process against a corporation; because it has no conscience; (t) This is also an error; for, in all cases, where a corporation is made defendant, the first and proper process for calling it in to appear and answer is the same as that used for summoning a natural person; that is, a *subpæna*; and accordingly the bill prays for a *subpæna*, and no other process. (u) The bill, it is true, must always ask for that original process which is suited to the nature of the case; against natural and artificial persons a *subpæna* is prayed for; against non-residents an order of publication, made the substitute of a *subpæna*, is asked; and against the Attorney-General it is prayed, that he may be attended with a copy of the bill; (w) which form of prayer, as against the Attorney-General, appears to be recognized by several acts of Assembly, (x) with only two exceptions, in which he is directed to be summoned, or served with a *subpæna*. (y) These prayers are indispensably necessary, because it is an established rule, that no one is to be considered a party to the suit, against whom no process or publication is prayed, and served with it, or the publication made. (z)

If the body politic neglects or refuses to appear as required by the *subpæna* which has been served on the mayor, president or any director or manager, or other officer, then the next process is a *distringas*, the form of which writ is substantially the same at law as in equity. (a) By this writ the sheriff is commanded to make a distress upon the lands and tenements, goods and chattels of the corporation; and it is endorsed thus: 'By the court at the suit of A. B. for want of an appearance, (or answer, as the case may be.)' But in England upon the first writ the sheriff generally levies forty shillings issues; upon the *alias distringas*, four pounds; on the *pluries distringas* he levies the whole property; and on the return of the *pluries* a sequestration is granted. (b) Thus far there appears to be not the slightest difference to be found in the books, either as to the form of the process, or in reference to the character of the corporation to be affected by it.

(s) *Harvey v. East India Company*, 2 Vern. 395; S. C. Prec. Cha. 128.—(t) Com. Dig. tit. Franchises, F. 19.—(u) *Willis Eq. Plea*. 8; *Lowten v. The Mayor of Colchester*, 2 Meriv. 395.—(w) *Willis Eq. Plea*. 7; 2 Mad. Pra. Chan. 202.—(x) 1785, ch. 72, s. 29, and ch. 78, s. 1; April, 1787, ch. 30, s. 4; 1799, ch. 79, s. 7.—(y) 1786, ch. 49, s. 8; 1794, ch. 60, s. 6.—(z) *Windsor v. Windsor*, 2 Dick. 707; *Reilly v. Ward*, 5 Bro. P. C. 495; *Lingan v. Henderson*, 1 Bland, 245.—(a) 2 Harr. Ent. 674; 1 Harri. Pra. Chan. 264; 1832, ch. 306, s. 5.—(b) 1 Harr. Prac. Chan. 264.

I can, therefore, feel myself at liberty to make no other alteration than to settle the amount in reference to the present value of money, and to declare, that upon the first *distringas* to compel an appearance or answer, the sheriff shall take issues or personal property of the corporation, to the amount of *twenty dollars*; and upon the *alias distringas* he shall levy *forty dollars*; and on the *pluries distringas* he shall distrain the whole of the personal estate, together with the rents and profits of the lands. (c)

If it shall be ascertained by the return of all these successive writs, that the corporation has no property upon which a *distringas* may be levied, or which can be taken under a sequestration, then the bill may be taken *pro confesso*, and the plaintiff may obtain relief accordingly; (d) or if, having no property, or after all its property has been sequestered, it still stands out, and refuses to appear and answer, then, according to what seems to be the better and more reasonable opinion, the plaintiff may have an attachment against the members; or, at least, those of them who have been duly summoned, or served with the *subpœna*, and thus notified of the institution of the suit. (e)

If, after a decree, the corporation neglects to comply therewith, upon being served with a copy of it according to the ancient practice, (f) as recognized by the act of Assembly; (g) now dispensed with; (h) the plaintiff may obtain a *distringas* to enforce obedience to it; and after the return of the first writ of *distringas*, he may have a sequestration; (i) and if the sheriff returns, that the body politic has nothing upon which the *distringas* can be levied, then the members of the corporation may be attached, or such other proceedings had according to the nature of the case, and having a proper regard to the extent of the liability of the members of the body politic, as may be deemed proper and lawful. (j)

Whereupon it is *Ordered*, that a writ of *distringas* be issued as prayed by the said petition of the plaintiffs, which writ is hereby directed to be endorsed and levied as above prescribed.

(c) East India Company's case, 1 Salk. 191.—(d) Salmon v. The Hamborough Company, 1 Ca. Chan. 204; Curson v. African Company, 1 Vern. 121.—(e) Rex v. Gardner, Cowp. 85; London v. Lynn, 1 H. Blac. 206.—(f) 2 Mad. Pr. Chan. 466.—(g) 1785, ch. 72, s. 25.—(h) 1818, ch. 193, s. 4.—(i) Harvey v. East India Company, 2 Vern. 395; S. C. Prec. Chan. 129; Com. Dig. tit. Franchises, F. 19.—(j) 2 Mad. Pr. Chan. 466; Salmon v. The Hamborough Company, 1 Cha. Cas. 204; Adley v. The Whitestable Company, 17 Ves. 324; S. C. 1 Meriv. 107.

Soon after which *The President and Directors of the Franklin Bank of Baltimore*, put in their answer, in which, as before, they admitted that a certain sum of money had been deposited in their bank by the defendant *Anderson*, in his own name and as his own property; but they averred, that they were entirely ignorant of all the other circumstances set forth in the bill.

The plaintiffs by their petition stated, that the defendant *Odom* had gone beyond sea, where they did not know, nor when he was likely to return; that the new matter charged in their amended bill was not within the knowledge of *Odom*, who had appeared by solicitor, and had answered the original bill. Whereupon they prayed, that a service of the *subpæna* upon *Odom's* solicitor might be construed and deemed as a sufficient service upon *Odom* himself, so as to compel him to answer, or if he failed to do so, that they might proceed regularly as if he had been summoned.

6th July, 1829.—BLAND, Chancellor.—The petition of the plaintiffs having been submitted, the proceedings were read and considered.

It appears, that the defendant *Odom*, who is a mariner and master of a vessel, in the merchant service, had made answer to the original bill; after which the plaintiffs filed an amended bill; but before *Odom* had been served with a *subpæna* to answer, he sailed on a voyage to a foreign port; that he is a citizen and resident of Maryland, and is as much at home as those usually are who, as mariners, are engaged in such pursuits as he is, and has been for some time past; and that he may now be expected to return soon to the United States, when he may be found at his usual residence in this state.

By the order of the 15th of September last, the plaintiffs attempted to treat *Odom* as a non-resident, and to proceed by publication as against an absent defendant to have their amended bill, as to him, thus taken *pro confesso*. But, conceiving the circumstances would not warrant it, I refused to pronounce the judgment consequent upon such a course of proceeding. All the acts of Assembly, which authorize a plaintiff to proceed against a defendant by publication, relate to absconding or non-resident defendants; but it was shewn and admitted, that the defendant *Odom* stood in neither of those predicaments. He is a citizen and resident of Maryland, now abroad in his proper and lawful calling, with an intention of returning when the voyage or trade in pursuit of which he left home, shall have been accomplished. A person

who goes abroad, not to reside, but for the purpose of adjusting his affairs; or a sailor, who is in the habit of coming backwards and forwards, in his vocation, cannot be deemed an absconding or a non-resident defendant. (*k*)

It is therefore perfectly manifest, that none of the acts of Assembly relative to absconding and non-resident defendants, apply to the case of this defendant *Odom*. The legislature intended, by those acts, to introduce a remedy in certain cases for which it had been held to be, in all respects, beyond the power of the court to provide. The object was to substitute a public warning, through the newspapers, for a personal summons, in cases where a summons could not be served at all, or without great difficulty. For, although the service of a *subpœna* abroad is deemed sufficient; yet it cannot, in all cases, be effected; and, where it can, the proof of such service is always attended with much delay and expense. Those legislative enactments, in relation to non-residents, clearly indicate, that the court, in the opinion of the Legislature, has no power to dispense with the service of process on the defendant, in the usual mode, whereby he is to be notified of, and called on to answer any matters of fact which the plaintiff has set forth as the foundation of a claim for relief against him. And this is recognized as a well established general rule by all the authorities. (*l*)

This, however, like almost all other general rules, has some exceptions or modifications. The court has substituted service, in several cases, where the defendant may have notice of the proceedings, and where, in case he goes out of the way, there is a person who he has named in court as his agent, and who the court can look upon as such. But a person named agent for a different purpose cannot be looked on in that light. (*m*) As in case of an injunction to stay proceedings at law, the attorney at law is such an agent, who the court can regard as one charged with the whole defence of the matter in equity; and so too, where a defendant, who lives abroad, refuses to answer, after having appeared as required by the *subpœna* with which he has been served, the court will order service on his solicitor to be deemed good service of a *subpœna* to answer an amended bill; because in all such cases there

(*k*) *White v. Greathead*, 15 Ves. 2; *Nelson v. Ogle*, 2 Taunt. 253.—(*l*) 2 Mad. Pr. Chan. 198; 1 Harr. Pra. Chan. 206; *Buckingham v. Peddicord*, 2 Bland, 447; *Nolan v. Nolan*, 12 Cond. Chan. Rep. 47, 121.—(*m*) *Smith v. The Hibernian Mine Company*, 1 Scho. & Lefr. 238.

is a person before the court charged with the care of the whole matter in controversy; and one who the court can, with propriety, regard as an agent having had committed to him the defence of the whole subject in behalf of the non-resident defendant. (n)

But, in this instance, a resident citizen defendant has evidently done no more than to commit his interests, in a specified case, to the management of his solicitor according to the defence expressed in his answer to the original bill. In these respects his situation is materially different from that of a contumacious non-resident defendant. The agency constituted by such a defendant is, evidently, that of a general charge; but the confidence reposed in the solicitor, in this case, is special and particular. He has been furnished with an answer or defence exactly fitted to a given case; and therefore, now, that it has been varied by an amendment of the bill, he cannot be presumed to be charged with a defence of the modified or newly formed case; which his client, being a resident citizen, has as clear a right to be notified of, and to answer unto for himself, as he had to consider and answer the original bill.

It has been suggested, that *Odom's* answer to the amended bill must be merely formal, as he knows nothing of the new matters therein stated. But it is impossible to anticipate how far its aspect may be changed by the answer which *Odom* has a right to make, and may give to this amended bill. (o) I am aware, that the case may be delayed very much by *Odom's* remaining abroad; but he is a resident citizen; and, as such, has an undoubted right to be notified of this amended bill by the service of process upon him in the usual mode, to the end, that he may, if he thinks proper, answer it for himself. And this, his unquestionable right, I have no power to impair in any way whatever. (p)

Whereupon it is *Ordered*, that the said petition be and the same is hereby dismissed with costs.

(n) *Gildenichi v. Charnock*, 6 Ves. 171.—(o) *Angerstein v. Clarke*, 1 Ves., jun., 250; *Jopling v. Stuart*, 4 Ves. 619.

(p) It has been since declared, that where a defendant, of full age, in any case, shall, upon two successive *subpœnas*, be returned *non est*, it shall be lawful to order publication of the substance of the bill or petition against such defendant as if a non-resident of this state, and to proceed in the same manner and to every effect, as if he were not a resident of this state, and as if the case made in the bill or petition were within any of the acts of Assembly made in respect of absent or non-resident defendants; Provided, that each of said *subpœnas* be delivered to the sheriff for service at least twenty days before the first day of the term to which it shall be returnable, 1832, ch. 302, s. 2.—*Buckingham v. Peddicord*, 2 Bland, 447.

The plaintiffs by their petition prayed leave so to amend their bill as to allege, that the defendant *Odom* was then a non-resident; and to pray for an order of publication against him. The leave was granted as prayed; and the bill amended accordingly. And then on motion of the plaintiffs, on the 31st of October, 1829, an order of publication was passed, in the usual form, warning the defendant *Odom* to appear and answer on or before the 8th day of March then next.

On the 13th of November, 1829, the commissioners made return of their proceedings under the interlocutory decree of the 14th of April, 1828, and in the testimony, so taken and returned, there is evidence which goes to sustain some of the claims of the defendant *Law* for disbursements as alleged in his answer.

After the 8th of March, 1830, the plaintiffs produced a certificate of the order of the 31st of October, having been published as required. And the parties submitted to the Chancellor sundry affidavits as to the residence of the defendant *Odom*.

13th March, 1830.—BLAND, Chancellor.—This case having been again submitted on the part of the plaintiffs, with a prayer for a decree to account; and with notes on the part of the defendants objecting to the passing of any such decree, the proceedings were read and considered.

On a careful consideration of all the affidavits filed since the passing of the order of the 6th of July last, it very satisfactorily appears, that the defendant *John Odom* always has been since the institution of this suit; and must still be deemed a resident of the state of Maryland; and therefore the order of publication treating him as a person who resided beyond the jurisdiction of this court, is erroneous in point of fact, and has been improvidently passed.

Whereupon it is *Ordered*, that the said order of the 31st of October last, be and the same is hereby rescinded.

After which the death of the plaintiff *Moore* was suggested; and on the 1st of October, 1830, the defendant *Odom* put in his answer to this amended bill, which was, in substance, the same as his answer to the first bill. To all these separate answers of the defendants, the plaintiff put in a general replication. A commission having been issued, was returned and filed on the 29th of December, 1830, without any testimony having been taken under it. After which the commissioners, on the 7th of March, 1830, filed a certificate, in which they stated, that by an agreement

between the solicitors, the return of the commission had been delayed, at the instance, and for the convenience of the defendants, in order that they might, if they thought proper, take any testimony they wished; but that the plaintiffs were not to lose the benefit of having the commission returned as before the December term. At the following March term the case was again brought before the court.

15th March, 1831.—BLAND, *Chancellor*.—On motion of the plaintiff's solicitor, it is *Ordered*, that this case be and the same is hereby referred to the auditor, with directions to state such an account as the nature of the case may render necessary; and such other accounts as either party may require.

After which the auditor, on the 3d of June, 1831, reported and filed a statement of an account between *John Odom*, and the owners of the schooner *Beauty*, shewing a balance of \$5,634 82, to be due to the plaintiff *McKim*. To which the defendants filed exceptions, and the case was again presented to the court.

10th August, 1831.—BLAND, *Chancellor*.—This case standing ready for hearing, and having been submitted on notes by the solicitor of the plaintiff, and no one appearing for the defendants before the close of the sittings of the term according to the rule of the court, the proceedings were read and considered.

Considering the pleadings as they now stand, and the manner in which the case has been brought before the court, the general replication has denied and put in issue every thing alleged by way of avoidance in the answers. All which matters must, therefore, be rejected; except, in so far as they may be found to have been substantiated by proof. The auditor was correct, therefore, in charging *Odom* with the whole amount of what he, in any way, had admitted he had received as the proceeds of the sale, or for the earnings of the schooner *Beauty*; and in rejecting all claims for disbursements on account of that vessel of which there was no evidence, other than the answers and mere exhibits of the defendants.

There is, however, some evidence in support of some of the claims made by the defendant *Law*, as ship's husband; and besides as to these the plaintiff's solicitor, in his notes, has distinctly admitted, that the defendants are entitled to a credit for \$453 23, which has not been allowed by the auditor; and therefore, the auditor's report must be rejected, and the plaintiff *McKim* must have a decree for the balance.

The plaintiffs by their bills claim a moiety of the proceeds of the sale and earnings of the schooner *Beauty* from the defendant *Odom*; and they resist the claim of the defendants *Law & Harrison*, for any alleged disbursements made by them as ship's husbands. As a foundation for an injunction, the plaintiffs endeavoured to identify the proceeds of the vessel from *Odom* to the bank, so as to have them detained there. But in this they have failed; and therefore, can have relief as prayed only against the defendant *Odom*. I am also of opinion, that the defendant *Odom* is chargeable with interest from the time when it appears that the proceeds of the vessel reached this country, and were applied beneficially to his use, and ought to have been accounted for or paid to the other joint owner of the schooner.

Whereupon it is *Decreed*, that the auditor's report be and the same is hereby rejected. And it is further *Decreed*, that the defendant *John Odom*, pay or bring into this court to be paid to the plaintiff *John McKim, junior*, the sum of \$5,181 60, with interest from the 18th of June, 1827, until paid or brought in, together with his costs in this suit, to be taxed by the register. And it is further *Decreed*, that the bill of complaint, as against the defendants *George Law* and *William G. Harrison*, be and the same is hereby dismissed without costs. And it is further *Decreed*, that the bill of complaint, as against the defendants *William F. Anderson*, and *The President and Directors of the Franklin Bank of Baltimore*, be and the same is hereby dismissed with their costs, to be taxed by the register; the said costs to be paid by the defendant *John Odom*.

DEALE v. ESTEP.

The sheriffs, for the time being, of the several counties, are the executive officers of this court; and as such amenable to it.—It is the duty of the sheriffs to execute all process and orders issuing from this court.—A summons or *subpoena* issued by commissioners requiring a witness to attend and testify before them, under a commission to take evidence, is a process which must be served by the sheriff.—For the service of all process, which a sheriff may be required to serve, he is entitled to have his legal fees allowed and taxed as a part of the costs in the case; and may enforce payment accordingly.

THIS bill was filed on the 5th of November, 1830, by *Samuel Deale* against *Richard Estep* and *Henry A. Hall*, surviving administrators of *Rezin Estep*, deceased, and *The President, Directors*

and Company of the Farmers Bank of Maryland. The object of the bill was to be relieved against a judgment obtained by these defendants, and to stay proceedings at law on that judgment. An injunction was granted; and on a motion to dissolve, on the coming in of the answer, it was continued until the final hearing. A commission was then issued; and the depositions of many witnesses were taken and returned. After which the case having been brought on for a final hearing, by a decree passed on the 19th of July, 1831, the injunction was dissolved, and the bill dismissed with costs, to be taxed by the register.

On the 26th of July, 1831, the defendants by their petition stated, that the *subpœnas* issued by the commissioners to sundry witnesses to appear before them and testify in the case, had been served by the sheriff of Anne Arundel county, who claimed such fees for serving the process, so issued by the commissioners, as were allowed to him by law, in general terms, for serving all *subpœnas*. And, as a voucher of this charge by the sheriff, the petitioners exhibited an account of several items amounting to *eight dollars and nineteen cents*; which, however, was not signed by the sheriff; nor did it specify the case, or under what authority, or at whose instance the witnesses had been summoned. This charge the register had refused to include in the bill of costs. Whereupon the petitioners prayed, that the register might be ordered to include this charge, as sheriff's fees, in the bill of costs which he had been directed by the decree to tax.

5th August, 1831.—BLAND, Chancellor.—This is indeed a case of very small amount in value; but it involves principles which are of the greatest importance as regards the practice and course of proceeding in this court. The right of this tribunal to resort to some effectual means of collecting legal testimony of every description, it is manifest, must be found among the powers necessarily belonging to it as a court; for, without such a power, it would be impossible to proceed with due effect in the administration of justice in any controverted case whatever. The only inquiry therefore is, as to the mode of proceeding which should be adopted to attain that great object. (a)

In England, the leading process, in courts of equity, is the *subpœna ad respondendum*, which is not, like the first process in a suit at common law, directed to the sheriff, commanding him to

(a) Amey v. Long, 9 East. 484; Lupton v. Hescott, 1 Cond. Cha. Rep. 138; Maccubbin v. Matthews, 2 Bland, 250.

summon, or to have the defendant before the court to answer the complaint of the plaintiff; but it is always addressed, personally, to the defendant himself, commanding him to appear and answer. It does not appear, that this first process in equity was ever required in England to be executed by a sheriff, who is the officer of the court, or by the messenger, as its immediate officer; (b) but it might be executed by any one, so that the court was satisfied by proof of its having been duly served. (c) If, after a *subpœna* has been served the defendant fails to appear, then the next process is an attachment; which is a writ directed to the sheriff, commanding him to attach the defendant so as to have him before the court. And if the defendant still persists in his contumacy, the several subsequent writs, which may be issued to compel an appearance, are all, in like manner, directed to the sheriff. (d) But as a sheriff is a mere local officer, having no authority beyond the bounds of his county, he cannot bring a defendant, who he has so taken into his custody, into the court while it is sitting in a remote or different county. And therefore upon his return of the fact of the defendant having been attached, the court, on application, will order him to be brought before it by a special messenger. (e)

In England when a commission issued to take testimony, as the commissioners were specially directed to call the witnesses before them, they might and most usually did so, by a process signed by two or more of them. But it was thought to be more regular and effectual to issue a *subpœna ad testificandum*, from the court itself, commanding the witnesses to attend upon the commissioners. This *subpœna*, as well as the *subpœna duces tecum*, which seems to be now little used in England, (f) like the leading process of the court, was not addressed to the sheriff, but to the witness himself, and might be served by any one. But if a witness failed or refused to attend, or to testify; and the court was satisfied by a certificate of the commissioners, and an affidavit of the fact, that the writ had been served, an attachment might be issued, directed to the sheriff, commanding him to attach the witness, who, on being taken by the sheriff, might, as on an attachment consequent upon a *subpœna ad respondendum*, be brought before the court by a special messenger. (g)

(b) Forum Rom. 35.—(c) Forum Rom. 37, 41.—(d) 1 Harr. Pra. Chan. 229.—(e) Forum Rom. 70; 1 Harr. Pra. Chan. 234.—(f) Prac. Reg. 346.—(g) Forum Rom. 118; 1 Harr. Pra. Chan. 445; 2 Fowl. Exch. Pra. 89; Wardel v. Dent, 1 Dick. 331; Hennegal v. Evance, 12 Ves. 201.

In Maryland the forms of these writs are the same as in England, they are always addressed to the party to answer or to testify; (*h*) and as in England they may be executed by any one, so that the court be satisfied, by affidavit, that they have been served. (*i*) Here as in England, the commission to take testimony directs the commissioners 'to cause to come before them all such evidences as shall be named to them by either the plaintiff or defendant.' Under this authority, which has been expressly recognized by positive legislative enactment, (*j*) the commissioners have always, when necessary, summoned the witnesses to come before them; and on their failing to attend, there seems to have been no doubt, at any time, that they might, on their contumacy being shewn to the court, be forced by attachment to attend and testify, even under a commission from a foreign tribunal. (*k*) And although the Legislature has provided a new and additional form of compelling the attendance of witnesses before commissioners authorized to take evidence, they have not introduced a more cheap and expeditious mode of proceeding. (*l*)

But, to clear away the difficulty which has been presented in this case, it will be necessary to ascertain how far the sheriffs of the several counties can be considered as the executive officers of this court for the purpose of serving writs of *subpœna* as well as of attachments.

It may be safely assumed, that where the Legislature has specifically allowed to a sheriff a particular fee for the execution of any process, that such allowance of a fee may be considered as a virtual declaration, that it is his official duty to execute such process. The last provincial act of Assembly by which officers' fees were regulated, makes a clear distinction between a *subpœna ad respondendum*, and a *subpœna ad testificandum*, by designating the first specially; and then, in the same section, allowing to the secretary a different fee for 'every *subpœna* and return.' But as the secretary was then the register in Chancery, as well as the clerk to the higher courts of common law, it may be supposed, that these last

(*h*) 1 Harr. Pra. Chan. 195; 2 Harr. Ent. 772.—(*i*) Hoyer v. Penn, 1 Bland, 29; Taylor v. Gordon, 1 Bland, 132, note.—*Showell v. Showell*, 1713.—Service of the *subpœna* proved before Col. Williams.—*Chancery Proceedings*, lib. P. L. fol. 8.—(*j*) 1785, ch. 72, s. 16.—(*k*) Gibson v. Tilton, 1 Bland, 354; Bryson v. Petty, 1 Bland, 182, note; Contee v. Dawson, 2 Bland, 283; Maccubbin v. Matthews, 2 Bland, 252; Harris v. Saunders, 10 Com. Law Rep. 373; Thurlit v. Faber, 18 Com. Law Rep. 136; Turnbull v. Moreton, 18 Com. Law Rep. 215; Clay v. Stephenson, 30 Com. Law Rep. 225.—(*l*) 1824, ch. 133.

mentioned kinds of *subpœna* were only those which issued from the courts of common law. But the same law, in a subsequent section, allows to the sheriff a fee for 'serving a *subpœna*,' without making any allusion whatever to the court whence it may issue; it also allows to the sheriff a fee for executing a 'Proclamation of Rebellion,' a process known only to the Court of Chancery, whence it is sufficiently evident, that it was then considered to be the duty of the sheriff to serve *subpœnas* as well as to execute all other process issuing from the Court of Chancery. (m)

The acts of Assembly regulating officers' fees under the government of the Republic are, in this respect, entirely unequivocal. For, in those paragraphs in which the fees of the register in Chancery are regulated, the *subpœna ad respondendum* is, by name, set down as the first item for which he is to be allowed a fee; and then he is allowed another fee 'for every *subpœna* and return;' which clearly shews, that those two kinds of *subpœna* were issued from the Court of Chancery; and that the register was to be compensated for each. And then, in other sections, by which the sheriff's fees are regulated, it appears, that he is to be allowed a fee for 'serving a *subpœna* and return.' (n) There is, it is true, no designation of the kind of *subpœna*, or of the court whence it emanates, for which he is to be thus compensated; but then the phrase is general, and sufficiently comprehensive to embrace all kinds of *subpœnas*, as well all those issuing from the Court of Chancery as from other courts. By the same laws the sheriff is allowed a fee for executing the process of a 'Proclamation of Rebellion,' which, although now abrogated, (o) it is well known could then be issued only from the Court of Chancery. The late act for regulating the fees of certain officers, (p) is silent as to sheriffs' fees; and therefore, affords nothing illustrative of the question now under consideration.

From these legislative enactments it is clearly deducible, that it was then considered as the duty of the sheriff to execute *subpœnas* and all other process emanating from the Court of Chancery. And besides, it appears from the records of the court itself, to have been the constant practice and usage for the sheriff to execute all *subpœnas ad respondendum*, *ad testificandum*, and *duces tecum*, which issued from it, as well as attachments. And it also appears, that on taking a party into custody, under an attachment, it had always

(m) 1763, ch. 15.—(n) October, 1777, ch. 10 and 13; October, 1778, ch. 17; November, 1779, ch. 25.—(o) 1785, ch. 72, s. 26.—(p) 1826, ch. 247.

been held to be within the power, and to be the duty of the sheriff to come out of his county, for the purpose of bringing the party so attached, actually before the court at the place where it was then located by law. (q)

Hence I feel satisfied, that, although *subpœnas* from this court may be served by any one, as in England, yet that such writs are here to be considered as, in effect, directed to the sheriff of the county in which the party to be summoned may be found; that it is as much the official duty of the sheriff to execute such *subpœnas* as any other process emanating from this court; and, that all the like consequences follow, both as regards the sheriff and the parties from the execution, or the neglect of such process, as from any similar process specially directed to the sheriff. How, or when this usage or principle commenced, or became established, is of no importance; but it certainly accords entirely with that direct energy, cheapness, and simplicity of character by which our chancery course of proceeding is so peculiarly distinguished.

In England, it would seem, that the power of sheriffs is so strictly local, that they cannot go beyond their respective counties even for the purpose of completing a duty begun within them; and yet, that, within their respective bailiwicks, they are considered as the executive officers of the High Court of Chancery. (r) But in Maryland the sheriffs of the several counties are held to be, for every purpose, the executive officers of this court; each ranging only within his own county for the performance of whatever duty is to be there begun or entirely executed; and with power to go beyond it, any where, in obedience to process, the execution of which has been commenced there. The Legislature has not only recognized and affirmed this to be the right and duty of the several sheriffs of the state, as regards the Court of Chancery, (s) but this court has been provided with additional means of enforcing the performance of this duty as against any sheriff, coroner, or other officer, or person to whom any process or order according to the course of the chancery court may be directed or delivered; or any sheriff, coroner, or other public officer, to whose hands any writ, process, or order of the chancery court may come or be delivered; (t) it has been

(q) *Cowel v. Seybry*, 1 Bland, 18, note; 1785, ch. 72, s. 23 and 24.—(r) *Forum Rom.* 35.—(s) 1785, ch. 72, s. 23 and 24.—*Molinson v. Hemsley*, 1712.—An attachment of contempt ordered against the coroner for not having the defendant's body before the court.—*Chancery Proceedings*, lib. P. L. fol. 1.—*Binney's case*, 2 Bland, 101.—(t) 1785, ch. 72, s. 23 and 24; 1797, ch. 43; 1818, ch. 193, s. 6.

authorized to enforce its decrees, by like process as the courts of common law upon their judgments, by writs which are directed to the sheriff; (*u*) it has been placed upon a footing with the courts of common law as to the mode of compelling sheriffs to make return of executions; and as to their being entered not called by consent; (*w*) and it has had extended to it the same facilities of transmitting its process to the sheriffs of distant counties, and of enforcing a return, that had been given to the courts of common law. (*x*)

It is clear, that commissioners, acting under a commission from this court, directing them to take evidence, have authority to issue a summons to call a witness before them; and if the witness should fail or refuse to attend and to testify, it is equally clear, that he may be forced to do so, or be punished by this court. The process, by which the witness is called before the commissioners, is a *subpœna*; and whether it issues direct from this court itself, or from its commissioners, it is a process alike legal; and one to which obedience may be enforced. For, the Legislature having expressly recognized the right of the commissioners to summon witnesses before them, it necessarily follows, that the court must have the power of enforcing their attendance there. (*y*) The public good as well as the immediate interests of the parties requires, that, in cases of contumacy to the law, obedience should be enforced with as little delay and expense as possible. If such a *subpœna* were to issue direct from this court, there is no doubt that it might and ought to be executed by the sheriff if required; and I know of no law or reason why such process should not be executed by him when issued by the commissioners, who, in that respect, act as a part of the court itself. (*z*) The sheriff being a public sworn officer, his return to all process is conclusive until the contrary is shewn; and besides, as he is charged with the execution of many similar duties over his county, such summons may, in most instances, be more readily and economically served by him than by any indifferent person.

I am therefore of opinion, that it was the right and duty of the sheriff to serve the summons issued by the commissioners in this case. And as a clear and necessary consequence of its being his duty to execute such process, it follows, that he is entitled to the

(*u*) 1785, ch. 72, s. 25.—(*w*) 1794, ch. 54; 1789, ch. 42; 1802, ch. 109.—(*x*) 1817, ch. 139; 1819, ch. 144, s. 3.—(*y*) 1785, ch. 72, s. 16; *Maccubbin v. Matthews*, 2 Bland, 252; *Bryson v. Petty*, 1 Bland, 182, note; *Anonymous*, 14 Ves. 450.—(*z*) *Cooth v. Jackson*, 6 Ves. 30; *Forum Rom.* 117; *Bryson v. Petty*, 1 Bland, 182, note.

fees allowed by law for the performance of such service; and the register must be directed to tax such fees in the bill of costs accordingly.

But in this case the sheriff has made out his account in so loose and indefinite a manner, that the amount, as now claimed, cannot be allowed. The process itself, with the sheriff's return endorsed, or a certificate by the commissioners of the service having been performed by the sheriff, should have been returned with the commission; or in place of it some unequivocal evidence must be produced, that such summons was issued by the commissioners, and served by the sheriff. But, as it seems to be unjust, at once, to reject this claim merely because of what evidently appears to have been a mistake of the claimant, I shall let the matter stand over with leave to have the claim, if practicable, fully and correctly authenticated.

Ordered, that the claim as set forth in this petition stand over until the 20th instant, with leave to produce further proof.

After which an additional voucher of this claim was laid before the Chancellor.

24th August, 1831.—BLAND, *Chancellor*.—This claim having been authenticated by a certificate of one of the commissioners, that the *subpœnas* had been issued by them and served by the sheriff. It is *Ordered*, that the legal fees for the services so performed by the sheriff of Anne Arundel county, be and the same are hereby allowed; and the register is hereby authorized and directed to tax the same as a part of the costs accordingly.

STEWART v. CHEW.

An injunction granted to stay trespass, there being no then depending suit to try the right, dissolved on the coming in of an answer which denied the trespass, and alleged that the acts complained of were done on his the defendant's own land.

THIS bill was filed on the 5th of May, 1831, by *William Stewart* against *John Chew*; it stated, that at a sale made under a decree of this court, the plaintiff had purchased a part of the tract of land called *Elkton Head Manor*, and was then in possession of it; and that the defendant had committed, and was then committing great

waste by cutting down timber trees and doing acts injurious to the land. Whereupon he prayed for an injunction to stay waste, for relief, &c. An injunction was granted as prayed.

The defendant in his answer admitted, that the plaintiff had made the purchase as stated; but specially denied, that he had or was then committing any waste as charged; and averred, that he, the defendant, had purchased another part of the same tract of land called *Elkton Head Manor*, adjoining to that purchased by the plaintiff, on which he had cut a large quantity of wood ready for market; and that by a survey which had been made, laying down the boundaries, as admitted, between the lands of this defendant and the plaintiff, it clearly appeared, that the defendant had committed no manner of waste or trespass whatever on the lands of the plaintiff. Upon this answer, the defendant gave notice of a motion to dissolve the injunction.

3d October, 1831.—BLAND, *Chancellor*.—The motion to dissolve the injunction standing ready for hearing, and having been submitted on notes by the solicitors of the parties, the proceedings were read and considered.

It is not intimated in this bill, that the plaintiff had instituted a suit of any kind which was then depending, to establish his right to the lands upon which the alleged wrong had been committed. It is therefore quite clear, that this cannot be considered as one of those cases in which an injunction is granted to stay waste and preserve the property pending a suit to try the title, or to ascertain the true location of the land to which the alleged injury has been done. And as it is not stated, that there is any privity of title or estate between these parties, this can only be regarded as a mere injunction to stay trespass alleged to have been committed by a stranger; and hence, according to the well settled course of this court, in relation to cases of this kind, where the defendant, as in this instance, positively denies all the facts of the imputed wrong and injury as charged in the bill, the injunction must be dissolved. (a)

Whereupon it is *Ordered*, that the injunction heretofore granted in this case, be and the same is hereby annulled and dissolved.

(a) *Duval v. Waters*, 1 Bland, 569.

THE BELLONA COMPANY'S CASE.

On a motion to dissolve an injunction no *ex parte* affidavits can be read.—A motion to dissolve an injunction is confined to the consideration of the statements of the bill, and the answer responsive thereto.

A corporation constituted of many stockholders may be virtually extinguished by all the stock being owned by one.—A gunpowder manufactory not a nuisance, because of the loose manner in which the edifices have been constructed.

The clause of an act of incorporation which gives the power of *eminent domain* to be construed strictly, but fairly.—The property of a corporation, as well as that of an individual, is subject to be taken for public uses, under the power of *eminent domain*.—What is such a public use as authorizes the taking of private property to be so applied.—Where there are several public uses, the exercise of the power of *eminent domain* may be so limited as to preserve them all.—A corporation considered as a mere citizen owner, within the meaning of the authority to exercise the power of *eminent domain*.

THIS bill was filed in Baltimore County Court on the 25th of August, 1831, by *The Bellona Gunpowder Company of Maryland*, against *The Baltimore and Susquehanna Rail Road Company*. The bill states, that the plaintiffs are a body politic existing as such under the acts of 1814, ch. 78, and 1824, ch. 32; that the objects of their incorporation were the manufacturing and vending of gunpowder, and the carrying on of any other branches of manufacture in their discretion; for which purpose they were authorized to purchase and hold lands, in fee simple or otherwise, not exceeding one thousand acres, and to erect thereon all needful buildings; under which authority they had purchased a tract of land in Baltimore county, containing less than one thousand acres, on which they had erected mills and buildings needful and convenient for the manufacture of gunpowder; that the plaintiffs had invested in this manufactory, in real and personal property, from seventy to eighty thousand dollars; that the defendants were incorporated by the act of 1827, ch. 72, by which they were authorized to construct a rail road from the city of Baltimore to some suitable point on the Susquehanna river; under which authority they had located their road nearly a mile over the land of the plaintiffs, so as to require the removal of one of their buildings used for the purposes of their gunpowder manufactory; that if the defendants were permitted to construct their road as thus laid out, it would stop the works of the plaintiffs for a length of time, and not only prevent them from manufacturing the materials on hand, but oblige their present customers to form connexions with other establishments; and that

such was the nature of the manufactory, and the hazard of carrying it on, that workmen could not be procured to carry it on, if subjected to the increased hazard, consequent upon such a thoroughfare as a public rail road running near or through the works; that the construction of the road as located, would be destructive, and in violation of the plaintiffs' chartered rights; that it might be located in a different way, so as to avoid any collision with the works of the plaintiffs, and at very little, if any, additional expense to the defendants; that the Legislature of Maryland had no right or power, of themselves and for the use of the public, to interfere, in any way, with the chartered rights of the plaintiffs, much less to authorize any subsequent private corporation to take, for their private benefit, any portion of the rights to which the plaintiffs were entitled, under their prior incorporation; but that no such authority was, in fact, conferred, or designed to be conferred upon the defendants by their act of incorporation; their whole power to take lands for their use, against the will of the proprietors, being limited to the case of individual proprietors, and not embracing the case of lands held by any previously incorporated companies, such as those belonging to the plaintiffs. Whereupon the plaintiffs prayed, that the defendants might be enjoined from making their road as located over the lands of the plaintiffs.

25th August, 1831.—KELL, *Associate Judge*.—Let injunction issue as prayed; to be dissolved on the 5th of September on motion therefor; unless the complainants satisfy the court, by affidavits, which they are hereby authorized to take before a justice of the peace, that the rail road can be located as suggested by complainants, or the same be admitted by the answers of the defendants. The affidavits to be taken upon two days notice to the opposite party or their solicitor.

Under this order the depositions of several witnesses were taken, returned, and filed. And on the 14th of September, 1831, the defendants put in their answer, in which they admit, that the acts for incorporating such a company, as the plaintiffs claim to be, were passed by the Legislature, as set forth in the bill; but they do not admit, that the actual incorporation of the plaintiffs ever did follow from those acts; or if it did, that they now have any existence as a body politic; on the contrary, they aver and believe, that *James Beatty*, of the city of Baltimore, is the sole, and only proprietor of the property known as the *Bellona Gunpowder Com-*

pany's Works; and that, in consequence of there being no other corporator of the alleged company, the charter, if any ever existed, has become null and void, and the company without any right or capacity whatever to sue or be sued. That the buildings of every description erected on the land claimed by the plaintiffs, were of the meanest kind; being principally constructed of unfinished plank, and deserving more properly the appellation of sheds than houses; that the defendants were incorporated by the acts of 1827, ch. 72, and 1830, ch. 49, under the authority of which laws they had proceeded to lay out the site and route of their rail road over the land of the plaintiffs, towards the town of Westminster; the location of which branch rail road does not, in any manner, interfere with any of the charter rights or privileges of the plaintiffs; and that a location of it in any other way, even if practicable, which they deny, would involve an expenditure of from fifteen to twenty thousand dollars; that, the plaintiffs being unwilling to contract for the sale of their land to the defendants, they caused a warrant to be issued for the purpose of having it condemned to their use, according to the provisions of the acts of Assembly by which they were incorporated; but have been prevented by this injunction from completing their acquisition of a title to it in that way. The defendants further deny, that the construction of their road, as located, will prevent the plaintiffs from carrying on their manufactory; or that it will be attended with any additional hazard to the workmen employed therein; and, that instead of their branch road passing nearly a mile over the land of the plaintiffs, it crosses their land only for a distance of a hundred yards at most. The defendants deny all knowledge of the other matters set forth in the bill.

Upon the suggestion of the defendants and an affidavit of their president, the proceedings were, according to the act of 1824, ch. 196, removed from the county court of Baltimore, and filed in this court on the 16th of September, 1831. After which notice having been given under an order, according to the course of this court, of a motion to dissolve the injunction, it was accordingly brought on for a hearing.

17th October, 1831.—BLAND, *Chancellor*.—The motion to dissolve the injunction standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

It was objected that the depositions which had been taken could

not be read on this motion. Among the great multitude of the records of past injunction cases in this court, which I have availed myself of every opportunity to look into, I have met with but one instance in which *ex parte* affidavits had ever been offered or heard; with this single exception, the long and copious stream of practice, in relation to such matters, shews, that no such affidavits should ever be admitted on a motion of this kind; and therefore, as well from reason as upon authority, I have uniformly declared, that no such affidavits should be heard on a motion to dissolve. (a) But this case having been brought here from Baltimore County Court; and these not being mere *ex parte* affidavits, but depositions taken under the order of the 25th of August, of that court; and as in cases of this description I have not felt myself authorized to revise or reverse any order of the court from which the case comes, (b) these depositions must now be received and read, as having been sanctioned by that order.

It is a well established rule of this court, that, on a motion of this kind, the defendant can only ask for a dissolution of the injunction upon so much of his answer as is properly responsive to the bill; no new matter in avoidance, making its appearance for the first time in the answer, can, in this stage of the case, be allowed to form any part of the foundation of the defendant's motion for a dissolution. It is a direct and responsive denial of the facts composing that case on which the plaintiff's equity rests which alone can entitle the defendant to a dissolution of the injunction. (c) Hence, all that has been said by the defendants as to the plaintiffs having, in fact, no corporate capacity, must be considered as new matter in avoidance of the plaintiffs' claim; and therefore cannot be now properly heard and determined upon.

But the suggestions which arise out of this portion of the defence, it is obvious, may be worthy of the gravest consideration

(a) It has been since declared, that the court, on application of any of the parties, may order testimony, in reference to the allegations of the bill, to be taken on behalf of all the parties, in such form as it may direct, and on such terms, and under such regulations, as to notice and otherwise, as may be deemed equitable; and so, however, that such testimony be returned by the day when the motion for dissolving such injunction shall be heard; and the order providing also, that notice of the granting such order be given as shall be prescribed by the court, on part of the party applying for the order, to the other parties named in the bill or their solicitor; and such testimony, at the hearing of such motion, shall be considered in connection with the bill, or petition and answers in the cause; 1835, ch. 380, s. 8.

(b) Strike's case, 1 Bland, 67.—(c) Salmon v. Clagett, ante 159.

when the court shall be called on for its judgment upon such a case. In the preamble of the act of 1824, ch. 32, which is one of the acts under which the plaintiffs claim to be a body politic, it is said to have been represented, that in consequence of the decrease in their number, it is impracticable, at present, to choose from their body five directors, the number prescribed by their original incorporating act of 1814, ch. 78; and therefore, it is declared, that three directors only shall be chosen to manage all the concerns of the company. Hence it would seem, that prior to the passage of the last of these acts, the body politic had actually become extinct, by reason of this impracticability of choosing five directors.

It is certainly within the constitutional scope of the powers of the General Assembly to constitute a body politic of one, or of a plurality of individuals; but if a corporate capacity be given to a plurality, and the stock of the company, by the owning of which alone any individual can be considered as a corporator, is all purchased up, and held by one, it would seem, that the body politic would be thereby virtually dissolved. And as it would seem, it might be considered as a fraudulent evasion of the law, for any one individual, who had purchased all the stock of such corporation; to attempt to claim the benefit of the irrepealable nature of such an act of incorporation, by allowing a part of the stock to be held by one or more other persons; and so, under the disguise of being a body politic, to protect himself from a personal responsibility for his debts; and also to prevent the Legislature from altering the act of incorporation under the notion, the good sense or constitutionality of which I have never been able distinctly to understand, that it was a contract, the obligation of which they could not impair. It has always seemed to me to be very clear, that no enactment of the General Assembly, whatever might be its character, whether considered as a mere law, or as substantially a contract, should be permitted to be made an instrument of fraud; or should have its operation continued in opposition to the interests of the people, as declared by the General Assembly, at the pleasure of any one man or set of men.

The defendants in their answer lay some stress upon the peculiar character of the buildings of the plaintiffs, with which the proposed road is to interfere. Admitting this to be one of those allegations in the answer which must be considered as directly responsive to the bill; yet I do not see how the nature of the buildings, or, in other words, the mere amount of the injury likely

to be done, can affect the question of right between these parties. Unless, indeed, the damage should be shewn to be so small, as, that the law would take no notice of it; as in actions of waste, where the waste is unimportant in its nature and trivial in amount. (d) But these buildings, it must be recollected, have been put up, as is alleged and admitted, for the manufacture of gunpowder; and are more properly suited for that purpose than if they had been constructed of brick, stone, or hard materials strongly bound together; in which kind of edifices an explosion would be attended with much more certain and wide-spreading destruction than in lightly framed houses or sheds, such as these are described to be; and therefore they could not be complained of as nuisances by those residing in their vicinity; because of their being too dangerously or improperly constructed for the uses to which they are applied. (e) It is then manifest, that the plaintiffs' cause of complaint cannot, in any sense, be deemed frivolous because of the frail nature of their buildings.

As to the mere facts of this case there is then no substantial difference between the parties. The plaintiffs assert and the defendants admit, that the proposed rail road has been located, and is intended to be constructed over a part of the land of the plaintiffs; and that one of their edifices, erected for the manufactory of gunpowder, is intended to be removed. The distance which the road is to pass over the land of the plaintiffs, and the amount of the increased hazard, although alleged and denied, and not particularly described, are unimportant as regards the questions of right between these litigants.

By the act of 1827, ch. 72, s. 15, the plaintiffs are authorized, for the purpose of making their rail road, to agree with the owner of any land for the purchase, or use and occupation of the same, 'and if they cannot agree, and if the owner or owners, or any of them, be a *feme covert*, under age, *non compos mentis*, or out of the county in which the property wanted may lie,' application may be made to a justice of the peace, and proceedings had to have it condemned to their use. Upon which it was urged, that although the defendants may have an unlimited power to contract or agree, in any manner, with the owner for any land they may want for their road; yet the power to take the lands of others from them, against

(d) *The Governors of Harrow School v. Alderton*, 2 Bos. & Pul. 86; *The Universities of Oxford v. Richardson*, 6 Ves. 706.—(e) *Crowder v. Tinkler*, 19 Ves. 626.

their consent, by this process of condemnation, is expressly limited to the case where they, the defendants, cannot agree, *and* the owner is a *feme covert*, &c. ; or, in other words, that the defendants must be unable to agree with the owner, *and* the owner must also be a *feme covert*, &c. Because as this provision authorizes these defendants to take from a citizen his property, against his will, it must be construed strictly ; and therefore the word *and* cannot, in this instance, be construed to mean *or* ; and consequently, that concurrence of circumstances has not been shewn to exist, which is indispensably necessary, according to the positive requisitions of this law, to enable these defendants to have the land of the plaintiffs taken from them without their consent.

I admit, that this section of the act, by which the defendants have been incorporated, is of such a character as to require to be construed strictly. But the whole must be so taken together as to carry into effect the chief and manifest purpose of the law ; unless the sense of the expressions used be such as to forbid their being interpreted in any but one way ; and when so taken, that the mode of proceeding prescribed cannot be so executed as to attain the object.

It was manifestly the intention of the Legislature to authorize the defendants to acquire any land they might want for their rail road in one of two modes ; first, by an agreement with the owner of it ; or if it could not be obtained in that way, either because of the absence of the owner, or because of his refusal to agree ; or because of his incapacity to contract, then the defendants should have the power to cause it to be condemned to their use at a fair valuation. This latter mode of acquisition was intended to be given to them in all cases where an agreement could not be effected. In case of the refusal of the owner ; *and* in the case of his absence ; *and* in the case of his inability to contract. In all the similar sections found in other acts of incorporation, the word *or* is used in place of the word *and*, found in this section ; so as, in effect, to declare, that where the acquisition could not be made because of the refusal of the owner, *or* because of his absence, *or* because of his inability to contract, that then the body politic might condemn, &c. ; and such a turn of expression, it may be admitted, does much more perspicuously express, what is obviously the intention of the Legislature, by all such enactments, than in this instance. But the expressions used in this act do, with sufficient clearness, convey the same intention. The fair sense of the section under

consideration is, that, in all cases, where the assent of the owner cannot be had, as in the case of his withholding it; *and* of his not being present to give it; *and* also of his not having a mental capacity to contract, the body politic may condemn; that is, in each one, *and* in all those cases he may condemn; but in the other similar enactments, where the disjunctive turn of expression is used, it is in substance declared, that in either, *or* in any one of those cases the acquisition may be made by condemnation. The necessary and obvious meaning of both forms of expression is, however, entirely the same; hence there is no foundation for this objection.

The plaintiffs in the next place rest their equity to have the defendants enjoined, upon the ground, that their property is held, as a part of their franchise, under a contract with the state, which the General Assembly can by no subsequent enactment impair. Among the other restrictions imposed upon the powers of the state governments, by the tenth section of the first article of the constitution of the United States, it is declared, that *no state shall pass any law impairing the obligation of contracts*.

It is not my intention, upon this occasion, to enter upon an enquiry as to what was the cause of this restriction, or to express any opinion as to its true sense and bearing. But, taking it for granted, as it seems to have been in the argument, that this restriction may be enforced against the states by one of the branches of the Federal government, according to the full extent of the jurisdiction assumed by the Supreme Court of the United States; and it may be admitted, that an act of the Legislature of a state, granting permission to individuals to take upon themselves the franchise of a body politic, when accepted by them, is a contract, within the meaning of this restriction; yet after all this shall have been granted in its fullest latitude, the question returns; does the taking of the plaintiffs' land, in the manner proposed, in the smallest degree impair the obligation of the contract between them and the state?

The legislative department of this state government, by its act of incorporation, or contract, if it must be so considered, gave to the plaintiffs nothing more than a license to purchase and hold lands, and to do certain other acts as a body politic. The acquisition of property and the manufactories, which they were authorized to make, and to carry on, were such acts as an individual might lawfully have done. Hence the whole scope of the act of incorporation, or contract between the state and the plaintiffs was, that the authority to do those acts as a corporation, should be secured

to them in that capacity, and nothing more. The General Assembly did not; and, it may be affirmed, could not enact, or covenant with the plaintiffs, that the land held by them should be considered as an estate more favoured and sacred than that of any individual citizen of the Republic; for, as it has been said, even the parliament of England, with all its unlimited sovereignty, cannot legally make any partial distinctions among the subjects of the realm. (*f*) All or any of the property of a citizen may be taken, upon a just compensation being made, and applied to the use of the public; and all property belonging, in like manner, to a corporation, must also be held liable to the same *eminent domain*, or peculiar power of the government.

The only plausible ground upon which any portion of the territory of the Republic could be exempted from a liability to the exercise of this power of the government of the state would be, that it had been previously applied to some greater or equally beneficial public use, with which the proposed new application was incompatible. But there is no pretext for claiming an exemption, upon that or any other principle, in favour of the land held by these plaintiffs; because it cannot, in any sense whatever, be considered as having been appropriated to any public use; it is merely held as private property, for the peculiar emolument of its incorporated owners, and which they may dispose of at their pleasure. The tenure by which they hold it forms no part of that which is of the essence of their act of incorporation, or the alleged contract between them and the state. There is therefore nothing in the acts incorporating the plaintiffs, even considered as a contract, which can be so construed as to prevent the condemnation of their land to a public use in the manner proposed by the defendants.

The plaintiffs have urged, that the application of their land to the purposes of the rail road proposed to be made by the defendants, is not such a public use as can justify the taking of it without their consent; although it should be agreed, on all hands, that the private property of corporations as well as of individuals, might be taken for any public purpose on a just compensation being made for it.

Under our government the property of one man cannot be taken without his consent, and given to another by any form of proceeding; and, consequently, no citizen can be compelled to part with

(*f*) Kames Pri. Eq. b. 2, c. 3.

his property, even on a just compensation being made, but for some public purpose. It is the public good alone which can sanction such a compulsory alienation of the property of a citizen. The point of this objection is, therefore, that the taking of this private property for the construction of the proposed rail road is an application of it to a private and not to a public use.

But the exercise of this power of the government of the state is not confined to those cases only in which the private property taken is to be applied immediately, directly, and exclusively to some public use, as to the making of an open highway or the like; for, it is enough, if it clearly appears, that the application of such private property to the proposed new use will be attended by a material public benefit which would not otherwise be so immediately and effectually produced. And, therefore, if it be shewn, that such a public good must necessarily be the result of such an application of the private property, it is of no consequence whether the condemnation or compulsory alienation places it in the hands of the state, of a corporation, or even of an individual. In all such cases the General Assembly may justly authorize a condemnation of any private property for such a public benefit, by such proceedings as are proposed to be prosecuted by these defendants. (g)

It may, in some cases, be difficult, in this respect, to distinguish between a public and a private use, and to determine how far this exercise of the government's power of *eminent domain* may be carried. But in this case I deem it sufficiently clear, that the construction of a rail road, as proposed by the defendants, must result in such a general advantage to the people as to warrant the court in pronouncing it such a public use as affords an ample justification of the proceeding by which the plaintiffs may be compelled to part with their land on receiving for it a just compensation. Hence there is no foundation for this objection of the plaintiffs.

The plaintiffs, after taking a comparative view of the *fifteenth*, *sixteenth*, *seventeenth* and *nineteenth* sections of the act by which the defendants have been incorporated, contended that the defendants' authority to acquire a title to land for the use of their rail road must be confined altogether to such land as is held by individual citizens, by mere natural persons.

But a fictitious body of citizens, formed by charter, is as a mere citizen, as natural bodies in a state of subjection to the government

of the country, and, therefore, they are, as regards their property at least, pure citizens to all intents and purposes whatever. (*h*) The *fifteenth* section gives to the defendants a voluntary, and a compulsory mode of acquiring land for the use of their rail road from the *owners* of it. They may agree with the *owners* if they can; if not then, they may force the *owners* to alienate in the manner prescribed. There is not the slightest intimation of any distinction as to the character of the *owners* so spoken of; except where it is said that if the *owners*, or any of them, be a *feme covert*, &c. But this rather tends to enlarge than restrain the comprehensive meaning of the term *owners*, by which all must be embraced, whether natural or artificial persons; bodies politic as well as individuals. So far it seems to be admitted, that this act is clear of all ambiguity.

But the *sixteenth*, *seventeenth* and *nineteenth* sections do not, in any manner, modify or restrain the general terms of the *fifteenth* section. It appeared, that the proposed rail road, in its route, must cross many highways; and that it might be convenient to allow it to pass along the same route then occupied by an existing turnpike, or over a public bridge; and it also appeared, that in all this there was nothing so incompatible as that the one road should be allowed to obstruct or destroy the other. And therefore it was declared, that the defendants should be authorized to construct their rail road across any established road, so that it did not impede its passage; and also, that they might contract for the use of any turnpike or bridge with which it might be necessary or advantageous to connect their rail road. The manifest intention of these enactments was to provide for the preservation of the then existing and established public uses to which any land might have been subjected; so that, in creating one public convenience another public convenience might not be destroyed. It was the preservation and making compatible with each other two or more public uses which might be brought into collision with each other, so that the people might be deprived of none of their public benefits, which was the sole and only object of these latter sections; and considered in this light they accord, in every respect, and perfectly, with all that is declared in the *fifteenth* section; and can, by no means, be considered as altering or restraining any right or power

(*h*) *Nabob of Arcot v. The East India Company*, 3 Bro. C. C. 303.

there given to the defendants. Hence I am perfectly satisfied, that there is no foundation for this last objection of the plaintiffs.

Whereupon it is *Ordered*, that the injunction heretofore granted in this case, be and the same is hereby dissolved.

BALTIMORE v. McKIM.

The land office is considered as the general market in which all public lands are sold.—In some cases individuals are allowed to acquire a legal title to land without going into the land office.—The public lands can only be sold for a valuable consideration, or disposed of with a view to some public benefit.—No appeal from a decision of the Chancellor as judge of the land office.—The extent of the authority to acquire a right to land covered by the tide of the basin of Baltimore, by making improvements thereon.—A patent may be granted for land covered by navigable water subject to the right of navigation.—No title can be obtained from the land office for any thing but land.—All improvements made upon land, by any one without right, belong to the owner of such land.

THIS case was brought before the Chancellor in the Land Office on *caveats* by *The Mayor and City Council of Baltimore* against the issuing of patents on several certificates returned by *Isaac McKim, Jannet Hollins, Joseph King, junior, Robert Howard, John White, Thomas Wilson, John Spear Nicholas, Dabney S. Carr, John S. Smith, Robert Smith and James Howard*, for separate parcels of the ground called *Smith's Wharf*. These certificates and *caveats* were entirely distinct. An order was passed on each appointing a day for hearing, directing the surveyor of the county to lay down the lands, and authorizing the parties to take testimony before any justice of the peace, on giving two days notice as usual; but as they depended upon the same principles of law, in all respects, the parties, by consent, conducted them as one case; depositions and proofs were taken, which with a plot of the whole ground, made by the surveyor, were returned; after which the solicitors of the parties were fully heard.

29th November, 1831.—BLAND, Chancellor.—To have a correct conception of the matter in controversy, it will be proper to recollect, that the city of Baltimore was laid out, and has grown up round the margin of a cove of the Patapsco river, near the mouth, and to the westward of the stream called Jones' Falls, which passes through the city; that much of the margin of this cove was originally a marsh inundated at every reflux of the tide; that as the

only navigable entrance to this cove, is by a narrow channel from the east, every encroachment upon it, by wharfing or making fast land, following the directions of the streets of the city, must be from the north, from the west, or from the south; and that Gay street approaches this cove, now called the basin, in a direct line from the north, and terminates at its intersection, at right angles with Pratt street, a part of the south side of which passes a few feet above the head of what is now called Smith's dock.

The land now claimed is a strip about twenty-nine feet wide, lying between the east side of Smith's dock, and an elongation of the east side of Gay street, from the south side of Pratt street into the basin, a distance of about eight hundred and sixteen feet; with an east extension, at right angles from its south end, of about eighty-six feet. It appears, and is admitted, that the tide water of the basin originally flowed a considerable distance above the present termination of Gay street; that the patent for the tract called *Cole's Harbour*, included the lands, on which this part of the city was laid out, only to the line of the tide water as it originally flowed, and no further; that no patent had ever been issued for any part of the land which was originally covered by the tide water of the basin; that the whole of the strip of land in question, at one time, formed a part of the bed of this navigable basin; that *John Smith*, who was the owner of a lot on Gay street extending to the tide, applied to the port wardens of Baltimore for permission to extend his wharf into the basin, together with ten or fifteen feet of Gay street; that, on the 26th of September, 1786, permission was granted to extend his wharf, as prayed, until it intersected a line drawn east from a point eighty feet south of the south side of Conway street, and parallel thereto, together with eleven feet of Gay street continued along the front of said wharf; but instead of taking only eleven feet, the wharf was carried out, as it now is, to about twenty-nine feet on Gay street; that this strip of land had been altogether made and raised upon the bed of the basin by *John Smith* and others, who completed it about the year 1796; and it was not, in any sense, an alluvion, or attached as such to any other fast land; that, upon ground made near and fronting the whole of this strip of land, warehouses had been built; and that *John Smith*, and those who claimed under him, for some years, charged and received wharfage; but in the year 1803, the city began to collect wharfage, and continued their collections until about the year 1828.

These claimants found their prayer for patents upon the facts, that the state had never, at any time, either by a grant from the Land Office, or, in any other legal manner, parted with its right of soil, in the land in question to any one; and that it is such a piece of grantable land for which they now may; or any one else might have obtained a patent, according to the rules of the Land Office, upon payment of the composition money.

On the other hand the *caveators* contend, that no patents can be allowed to issue; because the strip of land in question was a public wharf on which they, during many years, had charged and collected wharfage; and the right of soil in all such wharves had been virtually vested in them by the act which gives them the right to charge and collect wharfage; (a) since to give all the uses of land is, in effect, to give the land itself. And also because, even supposing no right had been vested in them by that act of Assembly; yet it was sufficient to prevent the issuing of a patent, for them to shew, that the state had previously parted with its right of soil to any one else; or that this ground was not the subject of a grant from the Land Office. To shew which they urged, that this ground was an extension, not of any land belonging to *John Smith*, or those claiming under him, but of a part of Gay street; and consequently belonged as a rightful incident to the patentee of *Cole's Harbour*, or those claiming under him; who alone were the owners of the ground over which Gay street passed, and the incidents and appurtenants thereto. Or, if, indeed, the right of soil in this strip of land had not accrued to and vested in those holding under the patent for *Cole's Harbour*, as a legal incident of their title; yet, that the ground in question, in its present condition, charged as it was with a public use, was not the proper subject of a grant from the Land Office.

The Land Office has always been, as it now is, the general market in which all public lands have been offered for sale; and into which any one capable of holding real estate might come and purchase according to the prescribed rules and terms of sale. This office, so peculiar in its nature, evidently originated from the circumstance of the right of soil of the whole country having been vested exclusively in the Lord Proprietary as a part of his private estate; and from the whole territory being at that time vacant, and held by tribes of savages in their national capacities, and not as

(a) 1827, ch. 162.

property belonging to individuals in separate parcels. (b) The charter of Maryland not only vested the right of soil in the Lord Proprietary, but it also clothed him with certain political and regal powers within his province; and hence, in establishing a Land Office, and laying down rules for the sale of the great body of his real estate, he followed, in many respects, the forms which had been adopted in England for the purpose of preventing fraud and imposition in obtaining grants of property from the king; and all grants of land here were accordingly required to pass under the supervision of the Chancellor; and to be attested by the great seal of which he was the keeper. If the rules of the office were complied with, and the purchase money paid, a grant for the land was issued as of course, otherwise not. (c) Among the earliest acts of the Provincial Legislature was one, which declared it to be illegal for any individual to purchase lands of the Indians to the prejudice of the rights of the Lord Proprietary. (d)

The mode of proceeding for the purpose of contesting the right to a patent by a *caveat*, being interposed against its issuing, was substantially the same here as in England. (e) From the judg-

(b) *Gifford v. Lord Yarborough*, 15 Com. Law Rep. 405.—(c) *Cunningham v. Browning*, 1 Bland, 299.—(d) 1649, ch. 3; 1798, ch. 82, s. 7; 1802, ch. 45; 1816, ch. 136.—(e) *Cunningham v. Browning*, 1 Bland, 299.

COURSEY v. HEMSLEY.—At the Land Office in the State House at the city of Annapolis, *Anno Domini*, 1721.

Present the honourable Philemon Lloyd, Esquire, his lordship's deputy secretary of this province, and sole judge in the determination of all differences and disputes arising upon land affairs within the said province.

A hearing was then moved for by Mr. James Heath, of counsel for Elizabeth Coursey of Chester River in Queen Ann's county, and a petition by him produced, on behalf of her son William Coursey, a minor and legatee of Col. William Coursey, late of Queen Ann's county aforesaid, Esquire, deceased. Complaining that a certain Vincent Hemsley of Queen Ann's county, upon the 22d of September, 1720, had obtained, out of his lordship's Land Office, a special warrant for the resurveying of two hundred and thirty acres of vacant cultivated land; which said warrant, as the petitioner afterwards understood, was executed upon the cultivation of a certain tract of land called *Coursey upon Wye*, heretofore, that is, upon the 12th of June, 1695, surveyed for Col. William Coursey, late of Queen Ann's county, deceased; and the said William, in his last will and testament, together with a greater part of the tract, being nine hundred and twenty acres in all, devised unto William Coursey, a minor as aforesaid; and that a certificate of the resurvey thereof had been already returned unto his lordship's Land Office, in order to have his lordship's grant thereupon, according to the course of the office. She, therefore, prayed to be heard by her counsel against the passing of Letters Patent upon the resurvey aforesaid, according to a *caveat* heretofore by her lodged in the office for that purpose.

But the said Hemsley, by his letters to the above Philemon, alleged an unpreparedness to come to a hearing at that time, and prayed a continuance of the cause;

ment pronounced by the Chancellor, upon a *caveat*, there was no appeal to a higher court as from a decree in an ordinary contro-

wherefore it was thought convenient upon his petition to postpone it until the Provincial Court in October following. Whereupon James Heath, of counsel for the petitioner, moved on his client's behalf, that no further or other process should be granted unto Vincent Hemsley or any other person in relation to the said tract of land called *Coursey upon Wye*; but if any error or defect be found therein, other than that which was already moved by Vincent Hemsley aforesaid, that she might have the liberty in the pre-emption of his lordship's favour therein, which was likewise granted and ordered accordingly.

October Provincial Court being the appointed time for hearing of this cause, Vincent Hemsley did neither appear by himself nor his counsel; but sent a petitionary letter urging many great inconveniences, that he must necessarily labour under if he were obliged to come to a hearing at that time. Wherefore, in favour of justice, and to prevent any censures of deciding his cause unheard, a further time was granted him; and a hearing appointed to be on the 29th of January, 1721, at the dwelling-house of Philemon Lloyd, the judge in land affairs aforesaid, as a place convenient unto both parties, and where it was supposed Mr. Hemsley could most conveniently attend.

At which appointed time, viz: the 29th of January, 1721, both parties appeared; and the complainant then moved, that the said Hemsley's special warrant, with the certificate of resurvey thereon, made and returned into his lordship's Land Office, for two hundred and thirty acres of cultivated land, part of *Coursey upon Wye* aforesaid, might be set aside and declared null and void; and that a minute thereof might be made in the margin of the record book, where the special warrant aforesaid is recorded. Seeing that the said Hemsley hath alleged the said two hundred and thirty acres of cultivated land is part of and included within the lines of a greater tract called *Coursey upon Wye*, heretofore surveyed for Col. Coursey, deceased, and his lordship's Letters Patent had thereon, more than twenty years past for the same; and that the said William Coursey, by his last will and testament, devised part of the tract of land aforesaid, called *Coursey upon Wye*, unto her said son William Coursey, a minor.

Thereupon the said Vincent Hemsley in justification of his resurvey and return aforesaid alleged in the *first* place, that notwithstanding the cultivated land, by him lately taken up, had been heretofore surveyed by Col. William Coursey, in his lifetime, as is suggested, and was a part of a greater tract called *Coursey upon Wye*; yet that the same survey, in law, and according to the strict rules of the office, is deemed and held to be null and invalid as if such survey had never been made; and as all other pretended surveys are deemed to be when made and done without sufficient authority from his lordship's Land Office. And further alleged, that the land warrant, upon which the said survey was grounded, was upon assignment from Col. Peter Lawyer, for nine hundred and twenty acres, part of a warrant for two thousand three hundred and forty-five acres, dated the 27th of February, 1694, which said warrant, upon inspection, was found to have been executed upon other land before the time of the assignment aforesaid, as appears by an entry upon the land records, where the said warrant is recorded; and further said, that the case of the said warrant is not at all mended by what follows upon record, viz: that new caution was given for the same. Seeing that the caution is not said to be given by Col. William Coursey, nor by any other person for his use; and, consequently, no warrant at all to affect that, nor any other lands, nor gave any authority to the surveyor

versy between individuals; because the decision on a *caveat* was not, in any way, conclusive of the right. If the patent was

for laying out the tract aforesaid, called *Coursey upon Wye*; which said tract of land, as the said Hemsley alleged, for the imperfections aforesaid, remained still to be vacant, and subject to his special warrant, laid upon the cultivation thereof as aforesaid.

Secondly.—It was alleged, that although the warrant upon which the surveyor had laid out *Coursey upon Wye*, should be held and deemed to be good and sufficient warrant to the surveyor for the taking up of so much of that tract called *Coursey upon Wye*, as had not before been cultivated; yet that the survey thereof, as far as it related to any part of the cultivated lands must necessarily be null and void; such lands being excepted in all common warrants, according to the usual form, ‘lands not already laid out for, nor cultivated by any person, nor lands reserved for his lordship’s use;’ but that the lands so by him, the said Hemsley, taken up, by virtue of his lordship’s special warrant aforesaid, were cultivated at and before the time of the survey of *Coursey upon Wye*, no one will pretend to deny. Wherefore as the said lands would not be affected by the common warrant aforesaid, allowing it to be a good warrant, which, however, he doth not grant, he prays that his lordship’s Letters Patent may be made out to him, the said Vincent Hemsley, according to the course of the office, for the two hundred and thirty acres of cultivated vacant land, according to his certificate of survey thereof already made and returned into his lordship’s Land Office.

Whereupon the complainant replied to the first allegation, and saith, true it is that the warrant upon which the survey of the tract of land called *Coursey upon Wye*, is grounded, was by an assignment from Col. Peter Lawyer for nine hundred and twenty acres of land, part of a greater warrant for two thousand three hundred and forty-five acres, which said warrant, as is above alleged, and according to a record thereof, was found to have been executed upon other lands before the assignment of the nine hundred and twenty acres, part thereof, unto Col. William Coursey aforesaid; but the petitioner also maintained, that it is also found, upon the same record, after the discovery of the imperfections of the warrant aforesaid; and, it is very probable, made by Col. Coursey himself for the greater security of his land, another entry is likewise found, next after the entry and discovery aforesaid, viz: upon the 8th of May, 1696, new caution is given for the same; which the complainant saith she is humbly of opinion was then accepted of by the Lord Proprietor as a full compliance with his conditions of plantation, it never having been practiced by his lordship, nor any of his noble ancestors, to take advantage of inadvertent slips or mistakes; but always when discovered have allowed the liberty of amending the same, as in this present case. And the petitioner farther saith, that although it be not expressly mentioned on the face of the records, that the new caution given was on the part of the said Col. William Coursey; yet it is implied, as a most consonant reason, that such new caution given for the mending the defects in the warrant aforesaid did affect the assignment made unto Col. Coursey’s part of that warrant, equally with all other parts thereof, it being declared upon record, that new caution was given for the same.

As to the second plea of the said Hemsley, that no common warrant would affect cultivated lands which, as he alleged, are excepted in all such warrants; the complainant answereth and saith. Notwithstanding it be at the present, and for many years hath been the practice of the Land Office to make an exception of all land already surveyed, cultivated or reserved for his lordship’s use; yet, that the practice of the office was not the same, at the time of laying out the tract of land called

refused, on account of the rules of the office not having been complied with, still the Lord Proprietary, like the king, might dispense with all rule, and give a patent at his pleasure; or if, on the other hand, a patent were allowed to issue; yet the patentee could only take subject to all prior claims, incumbrances and equities. Therefore it could have answered no good purpose to allow an appeal from any decision of the Chancellor as judge of the Land Office. (*f*)

Under the proprietary government, the Land Office was always open, as the market, where any part of the vacant lands of the province might be purchased. But to this rule there were excep-

Coursey upon Wye, the cultivated part whereof is now in dispute. And she further asserteth, that all common warrants, at the time of the making of that survey were qualified, and gave sufficient power to the surveyors to lay out, survey and make returns of cultivated as well as uncultivated lands, as in the present case now in dispute; and to prove the practice of the office at the time of laying out the tract aforesaid, the complainant produced an original common warrant, dated the 20th of June, 1691, and signed by Col. William Diggs and Major Nicholas Sewall, secretaries of this province; and eight months after the time of making out of the common warrant for two thousand three hundred and forty-five acres unto Col. Peter Lawyer, out of which warrant the assignment of nine hundred and twenty acres was made unto Col. Coursey aforesaid. The complainant thereupon argued, that it had been the ancient practice of the office to except such lands only as had been formerly surveyed or resurveyed for his lordship's use; but that all cultivated land of which time, the lands, now in dispute, were subject to common warrants, as well as clear vacant lands. She therefore prayed, on behalf of her son, a minor and legatee of Col. William Coursey, deceased, that the special warrant for the two hundred and thirty acres of land aforesaid, so as before by Vincent Hemsley obtained and executed upon the cultivation of that part of the tract called *Coursey upon Wye* devised unto William Coursey a minor as aforesaid, together with the certificate and other proceedings thereon, might be declared null and void, and that an entry be made thereof in the margin of the record book, where the special warrant aforesaid is recorded, setting forth the insufficiency and invalidity of the special warrant and return aforesaid.

29th January, 1721.—LOYD, Judge.—The arguments and allegations of both parties being fully heard and duly considered, it is adjudged, pronounced and declared, that the reasons offered by the petitioner in maintenance of a *careat* heretofore entered in the Land Office, at the making out Letters Patent in the name of Vincent Hemsley, for the land in dispute, are good and sufficient, according to the course and practice of the Land Office to bar the said Vincent Hemsley from any further proceedings thereon; and it is likewise declared, that the certificate and resurvey of two hundred and thirty acres of land aforesaid, part of *Coursey upon Wye*, already returned into his lordship's Land Office by Vincent Hemsley, aforesaid, be held and deemed to be null and void, as being found to lie within the bounds of a more ancient survey. And that an entry hereof be made in the margin of the record book where the warrant of such resurvey is recorded.—*Land Records, lib. E. J. No. 1, fol. 1.*

(*f*) *Ex parte Beck*, 1 Bro. C. C. 578; *Ex parte O'Reilly*, 1 Ves., jun., 112; *Ex parte Koops*, 6 Ves. 599; *Ex parte Fox*, 1 Ves. & Bea. 67.

tions. The Lord Proprietary, from time to time, withdrew large bodies of his lands from this market, which he declared should not be sold there until his farther pleasure was made known; and therefore to no part of such tracts, called *reserves*, could any title be acquired from the Land Office. (g) But these reservations were only restrictions upon the ordinary mode of selling; for the Lord Proprietary sold, leased, or gave away these reserves as well as other parts of his territory at his pleasure; of which there are a multitude of instances to be found among the records of the Land Office. And besides such regular and irregular grants, emanating from the Land Office, or direct from the Lord Proprietary himself, the Legislature, with his consent, appropriated to, or authorized the acquisition of land by individuals in various other peculiar modes. (h)

By the Revolution all lands which then belonged to the Lord Proprietary became absolutely vested in the state, and were so held for the public benefit; not however, as under the government of the Province, as the estate and for the private emolument of an individual, but for the use of the public; and so considered, the General Assembly, as 'the trustees of the public,' with a view to general convenience, made several reservations, which they declared should not be sold in the Land Office. (i) In England, it was formerly held, that the king, by virtue of his prerogative as sovereign, might give away or dispose of, at his pleasure, any of the public property. But of late this pernicious prerogative has been considerably curtailed; and, in some instances, the prodigal grants of the king have been totally annulled, and the property resumed by parliament for the public benefit. (j) In Maryland the right of disposing of the public property, in all extraordinary cases, has devolved on the General Assembly; the executive branch of the government having been expressly prohibited from exercising any prerogative by virtue of any law of England. But although the Legislature may correct mistakes or dispense with any of the rules of the Land Office, so as to enable a *bona fide* purchaser to obtain a patent for the land intended to be bought by him; or may dispose of the public lands, in any way, for a good and valuable consideration, either as rewards to public benefactors, as to the soldiers of the revolution, (k) or for the purpose of attaining some object of general utility. Yet I cannot concede,

(g) Land Ho. Assis. 92; *Smith v. The State*, 2 H. & McH. 246.—(h) 1696, ch. 24, s. 7.—(i) Land Ho. Assis. 346.—(j) 4 Inst. 44; Bac. Abr. tit. Prerogative, F. 2; 1 Plow. His. Ireland, 177; Smollett's His. Eng. ch. 6.—(k) 1788, ch. 44, s. 20.

that they may, as the Lord Proprietary often did, give away the public lands, at pleasure, to their favourites, regardless of any benefit to the people. (l)

(l) Hepburn's case, ante 97; 1745, ch. 9, s. 10; 1817, ch. 225; 1822, ch. 57; 1836, ch. 63.

ROSS v. BLADEN.—The Judges of the Land Office to the Chancellor.—May it please your Excellency.—There having been a dispute in the Land Office of an uncommon and extraordinary nature, in which Thomas Bladen, Esq. and Doctor David Ross are the persons concerned, we take the liberty, in pursuance of his Lordship's instructions, by which we are directed, in difficult and unprecedented cases, to desire your Excellency's advice and assistance, (*Land Ho. Assis.* 232, 234,) to submit to your Excellency, as Chancellor, a state of the case or matter depending before us together with our opinion, hoping you will be pleased to favour us with your Excellency's sentiments thereon.

On the 16th day of January, 1761, Doctor David Ross applied to us in usual form for warrants under the proclamation to resurvey, and be allowed the pre-emption of the following tracts of land, *Wills's Town*, *Buck Lodge*, *Sugar Bottom*, *Turkey Flight*, *Prized*, *Lawrence*, and *Bigg Bottom*, containing 2,254 acres, but as no certificates for those lands appeared to be returned or lodged in the office, which is essential to the issuing of a warrant under the proclamation, Mr. Ross petitioned for, and obtained special warrants to affect the lands aforesaid, having, as your Excellency knows is usual, first paid the agent caution money for the same.

On the 16th day of May following, the undermentioned certificates were returned into the office, signed by Mr. Thomas Cressap, who was deputy surveyor of the county at the times these certificates respectively bear date, viz: *Wills's Town*, surveyed in June, 1745, *Buck Lodge*, and *Sugar Bottom*, in June, 1746, *Turkey Flight*, and *Prized*, in August, 1746, and *Lawrence* and *Bigg Bottom* in November, 1746, containing in the whole 2,254 acres; surveyed, as is set forth in the said certificates, for Thomas Bladen, Esq. As the land described in these certificates appeared to be the same tracts for which Doctor Ross had, as we have already observed, obtained special warrants, we thought it our duty to forbid patent issuing to Mr. Bladen till we could examine the records and inquire how it had happened, that those certificates had lain so long dormant. On examination we found in the land records the following entries:

'October the 21st, 1743.—Order issued to the Surveyor of Prince Georges county to lay out for his Excellency Thomas Bladen, Esq. two thousand acres of land, caution to be paid on the return of the certificates, &c.'

'2,000 acres part of a warrant for 4,012 acres granted Doctor George Stewart the 3d day of February, 1746, and by him assigned to his Excellency Thomas Bladen, Esq. is applied to make good rights to the above warrant.'

'April the 15th, 1745.—Warrant then issued to the Surveyor of Prince Georges county to lay out for his Excellency Thomas Bladen, Esq. two thousand acres of land, caution to be paid on the return of the certificates, &c.'

'April the 16th, 1745.—Warrant then issued to the Surveyor of Prince Georges county to lay out for his Excellency Thomas Bladen, Esq. three thousand acres of land, caution to be paid on the return of the certificates.'

'Rights made good to 2,012 acres part of this warrant by applying so much part of a warrant for 4,012 acres granted said Bladen the 3d of February, 1746.'

That your Excellency may be thoroughly informed, we think it necessary to lay before you a copy of the original warrants, that were issued out of the office in consequence of the foregoing entries, and to state, in a distinct manner, the several

Since the revolution it has continued to be an established principle, that no appeal can be allowed from any decision of the

tracts, that were surveyed, and for which certificates were returned into the office by virtue of those warrants respectively.

•L. Gale.—Lay out for the use of his Excellency Thomas Bladen, Esq. two thousand acres of land, and return your certificate or certificates of survey thereof within six months from the date hereof: and for your so doing this shall be your warrant. Given under his Lordship's Lesser Seal of arms the 21st of October, 1743.'

The above warrant was renewed in the usual form, and the following tracts of land were laid out by virtue thereof:

Acres. When surveyed.		Acres. When surveyed.	
Buck's Lodge,	210, June, 1746.	Fright to Flenner,	100, April, 1744.
Sugar Bottom,	109, do.	Boils' Fancy,	50, do. 1745.
Claimed by Mr. Ross, 319.		Beaverdam Bottom,	138, do.
		Lanes' Field,	175, do.
		Moody's Pleasure,	50, do.
		Maiden Head,	58, do.
		Barring Hill,	80, Febru. 1745
		Welshman's Con-	
		quest, . . .	260, March, 1745.
		Beaverdam Bottom	
		enriched, . . .	130, do. 1745-6.
		Mills' Folly . . .	110, do.
		Cove, - . . .	510, April, 1746.
		Cumberland, . . .	625, do. 1751.
		2,286.	

The original warrant that issued in consequence of the second order being in the possession of the Surveyor the words thereof cannot be inserted, but the following tracts of land were laid out by virtue thereof.

Acres. When surveyed.		Acres. When surveyed.	
Turkey Flight,	264, August, 1746.	Three Spring Bottom,	248, Nov. 1746.
Bigg Bottom,	240, Nov. 1746.	Providence, . . .	240, do.
Claimed by Mr. Ross, 504.		Content, . . .	240, April, 1751.
		728.	

•P. Thomas.—Lay out for his Excellency Thomas Bladen, three thousand acres of land in any part of this province not formerly surveyed or cultivated by any person, or lands leased or reserved for his Lordship's use, and return your certificates of survey thereof into his Lordship's Land Office with all convenient speed, with the name of the place, and of what manor to be held. And for your so doing this shall be your warrant. Given under his Lordship's Lesser Seal of arms this 16th day of April, 1745. To Capt. Thomas Cressap, Surveyor of Prince Georges county.'

By virtue of the above warrant the following tracts of land were laid out:

Acres. When surveyed.		Acres. When surveyed.	
Wills' Town,	915, June, 1745.	Three Spring Bottom,	12, Nov. 1746.
Sugar Bottom,	121, do. 1746.	Walnut Bottom,	500,
Prized, . . .	235, Aug. 1746.	Dispute, . . .	285,
Lawrence, . . .	160, Nov. 1746.	Hunt the Hare,	240, June, 1747.
Claimed by Mr. Ross, 1131.			

By this state of the returns from the Deputy Surveyor, your Excellency will ob-

Chancellor, as judge of the Land Office ; and, indeed, there seems to be no more reason now why an appeal should be allowed, than

serve that there has been laid out for Thomas Bladen, Esq. by virtue of these warrants six thousand three hundred and five acres, of which two thousand two hundred and fifty-four acres are claimed by Mr. Ross ; and it is also evident, that five thousand and two hundred acres were surveyed before Mr. Bladen left this Province, which he did in June, 1747, yet he never made good, rights for more than four thousand and twelve acres, which was in 1746.

Your Excellency will observe, that in the order of October, 1743, as well as in the other two of the 15th and 16th of April, 1745, there are these words, 'caution to be paid on the return of the certificate,' which is unprecedented, and the more extraordinary as no special order appears, or is referred to.

By the 11th article of his Lordship's instructions, dated the 11th day of June, 1733, contained in the following words : 'There shall be in all future common warrants a clause inserted by proviso, that the patent shall be taken out within the space of two years after the date of such warrant which said clause you are hereby enjoined so strictly to observe as not to suffer the renewal of said warrants after such time or any patents to issue contrary to the true intent and meaning thereof,' it is, as your Excellency will observe, expressly ordered, that a conditional clause be inserted in every common warrant enjoining the person obtaining it to sue out patent within two years from the date of such warrant ; nevertheless, there is no such proviso or clause in the warrants granted by Mr. Bladen, which are therefore, in that respect, repugnant to his Lordship's instructions.

We shall conclude our remarks on these warrants with observing, that instead of the usual words, 'return your certificates of survey thereof within six months from the date thereof,' there are inserted in the warrant of the 16th of April, 1745, the words following, 'return your certificates of survey thereof into his Lordship's Land Office *with all convenient speed*,' which expression we conceive can never be construed to imply the space of fifteen or sixteen years.

It appears by an old and imperfect memorandum book in the office, that certificates for *Buck Lodge, Sugar Bottom, Providence, Turkey Flight, Bigg Bottom, Prized, Lawrence, Cove, and Thrice Spring Bottom*, were returned into this office some time before April, 1747. This Mr. Thomas Cressap, by his letter to us, dated the 6th of April, 1761, seems to admit, or rather insists on ; and is supported by the evidence of Col. Thomas Prather, who acted, at that time, as an assistant to Cressap ; and by the deposition of one Joseph Tomlinson, which deposition with that of Col. Thomas Prather, and Mr. Cressap's letter are submitted to your Excellency's perusal ; but we beg leave to remark, that although all certificates are directed to be returned by the deputy Surveyors into the Land Office, there is nothing more common than for the partys themselves, or for others in their behalf to withdraw the same ; nor can it be otherwise, for until the Examiner's endorsement appears on the back of each certificate as well as his Lordship's agents' acknowledgement of composition, the certificate is incomplete ; and as nothing appears to the contrary it is more than probable, if any regard be paid to Tomlinson's deposition, that this was the case with those certificates delivered into the office for Mr. Bladen, before April, 1747.

Upon the whole, as Mr. Bladen did not pay caution for, or make good rights to more than 4,012 acres, though he had it in his power before he left the Province, and as no person ever applied on his behalf to pay up caution for the remainder until May, 1761, which was after Doctor Ross had obtained his special warrants, and there is a sufficient quantity of land surveyed and unpatented to satisfy both their claims.

under the Proprietary Government. If the patent should have been improperly refused by the Chancellor, or because it could not

Therefore, we are of opinion, that as Mr. Bladen has only as yet obtained patents for 1,696 acres, that patents do issue to him for 2,316 acres more, he paying the arrearages of rent, which compleats his quantity of 4,012 acres, that being the whole for which he has paid caution.

We are also of opinion, that patents do issue to Doctor David Ross, of Prince Georges county, upon the certificates which have been or shall be returned into his Lordship's Land Office by virtue of the special warrants obtained by him on the 16th day of January, 1761, amounting, in the whole, to 2,254 acres, he having paid caution for that quantity, unless Mr. Bladen, or his Attorney shall produce an instruction from his late Lordship to support so unusual a proceeding: All which is humbly submitted to your Excellency's superior judgment, by your Excellency's humble servants.—B. Calvert, G. Stewart, 11th November, 1762.

13th December, 1765.—SHARPE, Chancellor.—From the foregoing statement, the proceedings on the part of Governor Bladen seems to be very much out of the common course; which, I conceive, no less than the express authority of, and a direction from the late Lord Proprietary could dispense with, either in Mr. Bladen's or any other person's case; and had there been such particular authority from his Lordship, either to the then Judges of the Land Office, his Lordship's agents, or to the Governor himself, it ought doubtless to have been entered at large, or at least noticed by some entry on record, to the end, that it might always have appeared, that his Lordship, who alone could do it, had dispensed with the usual course of proceeding in the case of Mr. Bladen; and that the judges had sufficient warrant for their justification in proceeding after such a manner. But there being, by your account, no such special authority from his Lordship to be found in the Land Office, which is the proper repository for every thing relating to his Lordship's grants of lands, nor even the least hint appearing among the records that any such order from his Lordship in favour of Mr. Bladen ever existed, you could not, I apprehend, presume there was any such order.

The affair hitherto being thus circumstanced, and the several surveys for Mr. Bladen having been made on such irregular and unusual warrants, I should have thought, that even if no person had applied for warrants to affect the lands, you would have acted justifiably, had you declined issuing any patents at all on certificates returned in pursuance of such irregular warrants till you could have laid the whole affair before his Lordship, and have received his instruction thereupon. But since Doctor Ross has applied for and obtained warrants to affect several of the tracts which, according to your statement, had been surveyed for Mr. Bladen, the principal thing, now to be considered, seems to be whether Doctor Ross has been regular in his applications; and, whatever may be done with regard to the rest of the lands, whether he has a right to patents for the 2,254 acres for which he obtained warrants.

And with regard to the regularity of Doctor Ross' application to the office on the present occasion; such special warrants as he obtained, seem to me to have been the proper warrants; for, as the lands in question had been surveyed by virtue of Mr. Bladen's warrants directed by the office to the Surveyor of the county, and a minute made in the office of the certificates having been returned, they could not, I apprehend, have been afterwards affected by a common warrant; and, by what you say in the foregoing statement, no warrant under the proclamation to affect them, by reason, that no certificates on Mr. Bladen's warrant were to be found in the office; and, if, under these circumstances, such special warrants as were granted to Doctor Ross would not affect the lands, it seems to me, that a person, for whom land hath once

be granted consistently with the rules of the Land Office; and the claim of the applicant should, nevertheless, have a solid foundation in equity and justice, the Legislature, exercising a large discretionary power over such anomalous cases, has never failed to provide for the correction of mistakes, or to grant relief by dispensing with those settled rules by which the party had been excluded from the benefit of a patent. (*m*) And, on the other hand, it has always been an established rule, never lost sight of in the office, that whenever there is any doubt as to the validity of the caveator's objections; and it appears, that they may be as well, and as effectually considered in the ordinary and regular course of judicial proceedings, after the claimant's legal title has been perfected; and that the pretensions of the caveator cannot be prejudiced, to permit the patent to be issued. (*n*)

From which it appears, that although it may be the duty of the Chancellor, in controversies of this kind, on the one hand, to intercept patents about to be irregularly issued, to quiet possessions and prevent litigation; (*o*) so, on the other, he has ever held it to

been surveyed, has nothing more to do than, by a collusion with the Surveyor, or indeed, without such collusion, after his certificate shall have been returned to the office, and there minuted to withdraw it again, under pretence of having it examined, of settling with the agent, or for some other purpose; and, for the future, keeping it in his hands in order totally to prevent his Lordship from receiving one shilling for the land, either from the party himself or by sale of it to any other person.

The warrants granted to Doctor Ross being of such a nature as oblige him, over and above the caution money paid by him at the time they were obtained, to pay for any improvements on the land or cultivation, the Lord Proprietary's interest seems, in this case, to have been consulted as much, in every respect, as it would have been had warrants issued under the proclamation. Nor do I conceive warrants under the proclamation could do any thing more besides describing the land, and intimating, that the person for whom the same lands was formerly surveyed had neglected to sue out patents within the two years, according to his Lordship's 11th instruction, quoted in the above statement.

If then Doctor Ross has been regular in his application and proceedings, did pay the caution money to his Lordship on obtaining his warrants, and has done every thing in his power to entitle himself to patents; while, on the contrary, there has been great irregularity and neglect, at least, on the part of Mr. Bladen; and the laying the former under any difficulties would tend to prevent application to the office for the future for lands liable to be taken up under his Lordship's instruction, I am of opinion, with you, that patents should forthwith issue to Doctor Ross for the 2,251 acres by him affected in the manner above stated.—*Land Records, lib. B. C. & G. S. No. 15, fol. 814.*

(*m*) 1801, Reso. No. 2, 3, 4, 5, 6 and 8.—(*n*) *Cunningham v. Browning*, 1 Bland, 320; *The Rail Road v. Hoyer*, 2 Bland, 258.—(*o*) *Land Ho. Assis.* 425.

be his imperative duty to smother no reasonable or plausible claim, or to withhold it from the deliberate examination of the ordinary and regular courts of justice. (*p*)

Some time after Baltimore had been laid out as a town the Legislature passed a law, by which a considerable addition was made to it; and, among other things, it was declared, that certain commissioners, seven in number, appointed to see the present and former acts, relating to the towns before mentioned, Baltimore and Jones' towns, put in execution; and cause them to be carefully surveyed by their outlines, therein including the branch, *to wit*: Jones' Falls, over which the bridge is built; and shall, from time to time, for preventing disputes, cause all the lots taken up and improved, or that shall thereafter be taken up, &c. to be regularly surveyed, substantially and fairly bounded and numbered. And all after purchasers of lots, whether before or after the passing of this act, shall be deemed to be within the said town; provided their lots be within the outlines thereof; and shall have as good estate in their lots, as if taken up, improved, and paid for under the original laws erecting the said towns. And that all improvements of what kind soever, either wharves, houses, or other buildings, that have or shall be made out of the water, or where it usually flows, shall, as an encouragement to such improvers, be forever deemed the right, title and inheritance of such improvers, their heirs and assigns forever. (*q*)

This law, it is obvious, according to the principles of justice, applicable to the subjects of which it speaks, can only be so construed as to authorize the owners of lots bounded by the tide of the basin to acquire a right to vacant land without applying to the Land Office, and without paying for it the stipulated price of vacant land. It operates as a legislative grant, for and in consideration of certain improvements, from which material and important benefits would result to the public. And the improvements being the consideration upon the formation of which alone the state parts with its right to the soil covered by the waters of the basin; it is clear, that no right can vest under it, until the specified improvements have been completed; for, if they should be left in an unfinished condition, it would amount to an abandonment of the right to acquire a title in that manner. (*r*) This, however, is

(*p*) *Johnson v. Hawn*, Land Ho. Assis. 418.—(*q*) 1745, ch. 9; 1836, ch. 63.—(*r*) *Giraud's Lessee v. Hughes*, 1 G. & J. 249.

a mode of acquisition of which none can take advantage but natural persons who hold lots bounded by the tide-water of the basin; in whom and their heirs the acquisition is to vest as an inheritance. It is obvious, therefore, that the city itself could acquire no right of property in this way; and besides, a wharf, one of the kinds of improvements mentioned as an example, being an extension of fast land into the water, the city never had any such land upon or from which any improvements of the sort could be made or extended. (s) But even natural persons can avail themselves of this privilege only in so far as the acquisition may be made by improving their own lots in such a manner as not to extend them in front of, or between the navigation of the basin and any public street or other lot belonging to an individual. (t) As, for example, *John Smith*, under this law, could not have acquired a right to any land, covered by the waters of the basin, by improving upon, or filling it up in any other than a south direction; because, in doing so, he would have crossed, or cut off the navigation from the next adjoining street or lot. (u) In this instance, however, he improved upon and filled up land which was, confessedly, not an extension of his own lot, but a part of Gay street. It is, therefore, perfectly clear, that no right could have been acquired to this strip of land by *John Smith*, or any one else, under this act of Assembly.

This act of the Provincial Legislature had prescribed a mode whereby the owners of lots in Baltimore might acquire a title to portions of the land covered by the navigable waters of the basin without applying to the Land Office. But, according to the English law, the king can at present make no grant in derogation of the rights of navigation and fishery; (w) in which respect also the Lord Proprietary had been expressly restrained by his charter; (x) and, as it would seem, under a sense of that restriction, by one of his instructions, he had directed his surveyors, that, in surveying old tracts, whereof part might be found to lie in the water, to be careful in certifying whether it had been washed away, or had been an error in the original survey. (y) From which, and the proceedings in the Land Office, an opinion seems to have been entertained by those who might be presumed to have been suffi-

(s) 1836, ch. 63.—(t) *Hale de Portibus*, 81; *Smith v. Hollingsworth*, ante 381.—(u) *Harrison v. Sterett*, 4 H. & McH. 540.—(w) *Blundell v. Catterall*, 7 Com. Law Rep. 108.—(x) *Chart. of Maryland*, s. 4 and 16; 13 *Niles' Reg.* 13.—(y) *Land Ho. Assis.* 289.

ciently well informed of the law of the office, that here, as in Virginia (z) a patent gave title, at most, no further than to low water mark; (a) and that no land, covered by any navigable tide-water, could be made the subject of a patent from the Land Office of Maryland. (b) Upon a more careful consideration of the whole subject, however, it has been finally settled, that the bed of any of the navigable waters of the state may be granted, and will pass if distinctly comprehended by the terms of an ordinary patent, issuing from the Land Office; subject only to the then existing public uses of navigation, fishery, &c.; which cannot be hindered or impaired by the patentee, or those claiming under him. (c)

(z) *Mead v. Haynes*, 3 Rand. 36.—(a) 2 Hen. Virg. Stat. 456; 1 Hazard's State Papers, 488.—(b) Land Ho. Assis. 148; *Lord Proprietary v. Jennings*, 1 H. & McH. 95; *Smith v. The State*, 2 H. & McH. 251.

RITCHIE v. SAMPLE.—10th July, 1816.—KILTY, Chancellor.—This caveat came on to be heard in the presence of the parties and by counsel for the defendant. It appears to be a case of considerable importance in its principles, and it would have been desirable to have heard counsel on the caveator's side also, so that the propriety of granting a patent, in such a case, might have been more fully examined.

I am, however, of opinion, that the defendant is not entitled to a patent, as the certificate stands, it being in express terms, for a tract or parcel of the *Susquehanna River*, comprehending a number of small islands. And the land covered by the water cannot be called grantable land; though possibly islands may have been taken up together, between which the water sometimes flows. It cannot be certainly known what effect a grant of the ten and a quarter acres would have on the river and the fisheries. And it is to be observed also, that, under a patent, the defendant would not be put to a suit to obtain possession, as there would be no person to bring suit against.

The attempt by Ritchie to take up the same land is not conclusive against him, as to the right; because he might have been caveated also; neither is his want of interest, if he has none, an objection, as it is a question involving the propriety of a grant, and the interest of the public. But the defendant may, on application, have an order to caveat his certificate.

FOWLER v. GOODWIN.—19th May, 1809.—KILTY, Chancellor.—The Chancellor in his decision and order in this case, (1 *Bland*, 327,) noticed the grounds on which they had been supported and opposed in the argument before him.

The surveys which were afterwards made at the instance of the caveator, were laid before him on the submission, without any explanation or further argument. And he perceived nothing in them to alter the main principle on which he decided.

It has since been suggested by the caveator, that a large part of the survey, number one, lies in the water of Bell's Cove, as appears by the plot and explanations, and the deposition of Charles Stewart. Whereupon, patents were directed to be issued in the other cases only—meaning number one.

The defendant, if he is desirous of obtaining a patent on that survey, will have to apply in writing for an order of correction for the purpose of excluding the part so lying in the water, or for such other order as he may think necessary. And any order for correction, or any other purpose that may be wanted by the caveator, must likewise be applied for in writing.

(c) *Browne v. Kennedy*, 5 H. & J. 195; 13 Niles' Reg. 225; 1833, ch. 254, s. 7.

And, by a late act of the Legislature, it is declared, that individuals may locate and obtain an exclusive title to oyster-beds, in any navigable waters, in the manner therein prescribed, without applying to the Land Office. (*d*) And, as it would seem, the General Assembly may, for the benefit of the public, grant to an individual any navigable water together with the land which it covers. (*e*)

At an early period an obscure and unsettled notion seems to have prevailed, that the owners of the uplands had a sort of inchoate or pre-emptive right to the contiguous *marshes*, lying between their uplands and the shores of the tide. (*f*) And such *marsh* was, by the land law of 1699, declared to belong absolutely to the land to which it was adjacent; (*g*) but, that law has been long since repealed, and I find nothing which shews, that the owner of a tract adjoining navigable water could claim any sort of title to any part of the land covered by the tide beyond low water mark; because of its being immediately adjacent to the land held by him. (*h*)

(*d*) 1829, ch. 87; *Scrutton v. Brown*, 10 Com. Law Rep. 385; *Attorney-General v. Burrige*, 6 Exch. Rep. 354.—(*e*) 1826, ch. 212; 1827, ch. 33; 1828, ch. 54.—(*f*) Land Ho. Assis. 147, 157.—(*g*) Land Ho. Assis. Append. 9.—(*h*) But a fee simple owner may extend a wharf into a river so as he does not thereby injure the navigation or fishery; 1835, ch. 163.

HYDE'S CASE.—To His Excellency Robert Eden, Esquire, and the Honourable Daniel Dulany and John Morton Jordan, Esquires, commissioners for the sale of his Lordship's lands.

The petition of Thomas Hyde, of the city of Annapolis, humbly sheweth, That your petitioner is seised in fee of a lot of ground on the south-east side of Bishop street, and at the head of the Cove, south-west of the city, which said lot begins at a locust post standing upon the bank by the said Cove; and runs from thence south eighty degrees, west ninety-nine feet to another locust post; then north sixty degrees, west two hundred and seventy feet to another locust post at the end of the line of Bishop's street; then with Bishop street north-east one hundred and forty-eight feet and one-half, to a locust post of Mr. James Carrol's lot; then with a straight line to the beginning.

Your petitioner further sheweth to your Excellency and Honours, that your petitioner's first course extends the whole length of the head of the Cove, and nearly parallel to the same; and that originally the tide-water flowed up to his said course; though now, by the filling up of the Cove for the purpose of a tan-yard, a considerable piece of ground intervenes between your petitioner's first course and high water mark; which said ground, your petitioner, to prevent controversies hereafter, is willing to purchase of his lordship. Your petitioner therefore prays a special order for a warrant of resurvey of the said lot and ground; and that, upon paying a reasonable consideration for the said ground, your petitioner may have patent for the same; and your petitioner as in duty bound will pray, &c.

1st April, 1771.—The commissioners for the sale of his lordship's manors, &c.

It is admitted, however, in this case, that the strip of land in question was not included within the boundaries of the tract called *Cole's Harbour*, of which *John Smith's* lot was a part; and, that no patent had been granted for it to any one; whence it is clear, that, as it might have been, at any time, made the subject of a distinct grant; and could not be attached to any other tract, as an incident or appurtenant, and no title to it had been acquired under the act allowing owners of lots to extend them into the water, it must now be considered as the property of the state. (i)

But considering the bed of this basin as being property, like all the other lands of the state, which are covered with navigable water, to which a legal title might have been acquired by any one from the Land Office, subject to the uses of navigation, &c.; or as being property, a title to portions of which might have been acquired according to the act allowing certain lots to be improved; (j) yet it appears, that both of those modes of acquiring title to it were, in some respects, modified by a subsequent act of Assembly, by which it is declared, that the port wardens should ascertain the course of the channel; that no wharf should be extended into the basin, so as to divert the course of the channel; and that no person should make a wharf without the permission of the port wardens; who were directed to prevent any obstruction to the navigation, and to keep the harbour clear for the use of

being of opinion, that they are not empowered to dispose of any land within the city. His Excellency the Governor was pleased to signify, that if Mr. Hyde would petition His Lordship, he would forward the same; and, in the interim, no person whatever could claim any prior title thereto.—M. S.

This shews, that there was then no pre-emption right in the owner of any tract to any vacancy originally existing, or afterwards made, not alluvion, lying between such tract and the tide; and that such vacancy was considered as land subject, like any other land, to be sold in the Land Office. But in this particular case it was not liable to be so taken up by a warrant of resurvey, because, as appears by the following among other instructions given by the Board of Revenue to His Lordship's agent and receiver-general, the taking up of any such land had been prohibited by a *reserve*, the then existence of which must have been the cause why no patent could be granted to Hyde.

30th June, 1768.—'A reserve being laid on all vacant land that now is or shall or may be hereafter found within the city of Annapolis and town of Baltimore, or within five miles round the said city and town, be it by escheat or otherwise, you are not to do any act, that may affect these lands, without particular instructions from His Lordship or this Board.'—*Proceedings of the Board of Revenue, fol. 22—a book in the Land Office.*

(i) 1745, ch. 9; *Harrison v. Sterett*, 4 H. & McH. 540.—(j) 1745, ch. 9.

vessels. (*k*) Whence it appears, that no wharf can be extended beyond the margin of the channel, even with the consent of the port wardens. And these port wardens having, as directed by this law, made a survey designating the lines of the channel, that is the line, now commonly called the port warden's line, beyond which no improvements can be made into the basin.

These provisions do certainly restrict the mode of acquisition given by the act for making improvements; (*l*) and assist in giving perpetuity to the public right of navigation with which the soil was originally encumbered, by requiring, that care should be taken to keep it always free from obstruction. This last act, it is therefore evident, cannot be so construed as to give any additional facilities to acquiring title to, and making fast land of any portion of the bed of the basin; but, on the contrary, as directly curtailing those means by which a title to, and the use of it, might previously have been obtained. The port wardens could give to no one a right to encroach upon the basin in any direction, or to make a wharf where, prior to the passage of this law, he had no such right; they might limit and control the then existing powers of individuals, but could give them no new powers or rights whatever. This is the view which has long since been taken of this law by the courts of justice. (*m*)

Hence it is manifest, that the permission given by the port wardens to *John Smith*, to fill up and build a wharf on eleven feet of Gay street, was wholly illegal and a mere nullity; and as to the farther encroachment upon Gay street, it has not been intimated, that *Smith* and others had even a pretext or shadow of legal authority to do what has been done by them.

It is perfectly clear, from the proofs, that the strip of land in question cannot, in any way, be regarded as an alluvion, the right to which would accrue to the owner of the adjacent land to which it had fastened; (*n*) but having been made, and built up, as a

(*k*) April, 1783, ch. 21, s. 8 and 9; 1753, ch. 27.—(*l*) 1745, ch. 9.—(*m*) *Harrison v. Sterett*, 4 H. & McH. 540; *Smith v. Hollingsworth*, ante 381.—(*n*) *Browne v. Kennedy*, 5 H. & J. 195; *Ridgely v. Johnson*, 1 Bland, 316, note; *The King v. Lord Yarborough*, 10 Com. Law Rep. 19; *Gifford v. Lord Yarborough*, 15 Com. Law Rep. 403.

HAMMOND v. FORREST.—16th November, 1810.—KILTY, Chancellor.—The hearing of the *caveat* in this case came on in the Land Office on the 15th, when the exhibits and depositions were read, and the case was argued by counsel on each side.

On consideration, the Chancellor is of opinion, that the *caveat* ought to prevail, and that the defendant is not entitled to a patent. It does not appear, however, that

wharf, by *John Smith* and others, on land which it is certain did not belong to them, it follows, that it must, like all such improvements which a wrong doer puts upon the land of another, become the property of him to whose land it has been affixed. So that this wharf has long since, in fact, become the absolute property of the state to whom the soil upon which it was built most unquestionably belonged.

But it has been urged, that the whole of this strip of land called *Smith's wharf*, is a public wharf, for the use of which the city of Baltimore has, for a long series of years, charged and collected wharfage; and, therefore, that the right of soil in it has been expressly vested in the city by the act allowing the corporation to charge and collect wharfage; (o) because as wharfage was the only benefit which could be derived from this land, the act which gave that sole benefit, virtually and necessarily thereby gave an absolute right to the soil itself. And further, that the granting of a patent would be incompatible with the rights of the public in general, if not with those of the city in particular; and, therefore, it ought not to be allowed to issue, since it could be attended with no good, and would inevitably be used as the means of litigation and strife.

In England the subjects which may be granted by the king are as numerous and as various as the sorts of property, and the kinds of prerogatives held and enjoyed by him; the most of which he may, by a patent under the great seal, grant to an individual. (p) But here no department or branch of our limited government has been entrusted with any such large and uncontrolled power of making grants to individuals. The executive has been prohibited from exercising any such prerogative; and the Legislature have only so much of a discretionary power delegated to them as will enable them to act within their proper sphere for the public good. No

the ground in question is connected with the main land by the bar, which is referred to from the letter N. on the plot. An objection might be made from what is stated in the depositions, and marked on the plot as to the course of the ferry-boat, which goes over the island, if, in that case, it can be so called, or rather, by the intersection of the water, makes two islands of the land.

But the question is taken up on the general principle of its being an island, and according to the civil law; and according to the decree of the late Chancellor, in the case of *Ridgely v. Johnson*, (1 *Bland*, 316, note,) it is considered as belonging to the *caveators*, as owners of the land on the nearest side, who appear in the part opposite a part of the island to be bounded by the river.

It is therefore *Adjudged, Ordered, and Decreed*, that the *caveat* be ruled good.

(o) 1827, ch. 162, s. 4; *The Wharf Case*, ante 361.—(p) *Bac. Abr. tit. Prerogative, F.*

patent can issue from the Land Office, but according to its settled rules ; or for any thing not allowed by law to be sold there according to those rules. Nothing can be sold in the Land Office, but the state's right of soil in land, and the improvements affixed thereto as parcel thereof. The title of the state of which it there makes sale, is only in such land as had never before been granted to any one ; or where an individual had done some acts towards acquiring a title which he had neglected to complete ; or where the complete title which had been granted, had fallen back, or escheated for want of an heir or successor of the original grantee, or him who claimed under him, who could take and hold.

Hence it is always distinctly understood, that every one who goes into the Land Office, with an intention to buy, only proposes to purchase of the state its title to lands held in one or other of these modes ; because nothing else can be sold there. A patent from the Land Office can convey nothing else ; it cannot give to the grantee any franchise or privilege which is not necessarily and always embraced in a grant of the legal title to the land itself ; it cannot give to the grantee a mere right of way ; or a right to demand and collect toll or wharfage any where ; because such things are not, and cannot be sold or granted in the Land Office. And, therefore, no question concerning any right to demand and receive toll or wharfage any where can be incidentally heard and decided by the Chancellor upon a *caveat* in the Land Office.

But if land, to which the state has a title, is in any way incumbered, such incumbered title may well pass by a patent from the Land Office ; and the grantee will take and hold, subject to such incumbrance. As where the owner in fee, after having leased the land for years, died intestate and without heirs ; so that his right escheated. It was *held*, that the grantee from the state, under an escheat warrant, could only take subject to the lease. (*q*) So, too, where the land had been mortgaged before the title reverted to the state. (*r*) And where the state had granted land covered with navigable water ; it was held, that the grantee could only take subject to all the public rights of navigation, &c., which he could not in any manner obstruct or impair. (*s*)

(*q*) *Line's Case*, 1680.—At a council held in the Land Office.—*Land Records, lib. B. C. fol. 118.*—(*r*) *Hix v. The Attorney-General*, Hard. 176 ; 1799, ch. 79, s. 7 ; 1805, ch. 93.—(*s*) *Brown v. Kennedy*, 5 H. & J. 195 ; *Blundell v. Catterall*, 7 Com. Law Rep. 108.

From which it necessarily follows, that if a public street or road passes over any land belonging to the state, the patentee of such land can only take subject to such right of way. A wharf, in a public port, is, as to this matter, governed by the same general principles of law. The use of a wharf, like that of a road or a navigable river, may belong to the public, or it may be held entirely separate from the soil itself, upon which the wharf has been built. And, consequently, a grant of the state's title to the land cannot, in any manner, affect a pre-existing right to the use of the wharf any more than a grant of the bed of a navigable river, or of the land over which a road passes, can affect the previously vested usufructuary interest of the public, or of any individual. (*t*)

And, therefore, although it is in general true, that it is enough to prevent the issuing of a patent, for the *caveator* to shew an outstanding legal title any where, not belonging to the state; (*u*) yet as no such title has been shewn here, I am clearly of opinion, that a patent may well issue for this strip of land; because the grantee can only take it, as it is, subject to all the uses with which it may have been previously charged.

Whereupon it is *Decreed*, That the said *caveat* of *The Mayor and City Council of Baltimore*, against the said certificate of *Isaac McKim, &c.*, be and the same is hereby set aside and overruled with costs, to be taxed by the register.

HUGHLETT'S CASE.

A right to take out a warrant of resurvey is an incident only of a *legal* title derived from a patent, or of an imperfect legal title under a certificate compounded on.—Where the holder of a tract of land by a legal title, by a warrant of resurvey, takes in some contiguous vacancy, and then makes sale of the original tract by its name and description, as the vacancy embraced by the certificate, under the warrant of resurvey, does not thereby pass to the purchaser, he cannot obtain a patent upon such certificate of resurvey.

THIS case arose in the Land Office on a petition by *William Hughlett*, for a patent. It appeared, that *Aaron Allford*, holding a patent for a tract of land containing three hundred and sixty-five acres, by the name of *Allford's Fancy*, had obtained a warrant of

(*t*) *Godtitle v. Alker*, 1 Burr, 143.—(*u*) *Hammond v. Godman*, 1 Bland, 318, note.

resurvey, by which he included ninety acres of vacancy, making in the whole four hundred and fifty-five acres ; which tract, in the certificate of resurvey, is called *Aaron's Addition*. *Aaron Allford* fully compounded for the vacancy ; and afterwards died leaving an only child, *Sarah*, his heir ; who married *Richard Cooper*, and had issue, *Ezekiel Cooper* and *Sarah Cooper*. After which *Richard Cooper* and wife died ; and these lands descended to their two children. *Sarah Cooper* married *Charles Buckmaster*. And on the 10th of January, 1824, *Ezekiel Cooper* and wife, and *Charles Buckmaster* and wife conveyed the tract called *Allford's Fancy*, by a special reference to the patent for its boundaries, to *Henry M. Goodwin*, who, on the 25th of July, 1825, conveyed the same tract, specially describing it, to *William Hughlett*, the petitioner, who by this, his petition, prayed for a patent on the certificate for *Aaron's Addition*.

5th January, 1828.—BLAND, Chancellor. (a)—It is clear, that the right to take out a warrant of resurvey for the purpose of including contiguous vacancy is incident to every legal title to land. But it is an incidental right which belongs to the holder of the legal, not of the equitable title to the estate. If *Aaron Allford* had bound himself to convey *Allford's Fancy* to the petitioner ; and had, afterwards, taken advantage of his being the mere legal holder to obtain the contiguous vacancy to the tract he had thus sold ; but for some peculiar circumstances, equity would compel him to convey to the purchaser all the land he had thus obtained by virtue of the right incident to the legal title. (b)

Here, however, the holder of the perfect legal title to *Allford's Fancy*, by virtue of the certificate returned and compounded on, has obtained a good, but imperfect title to ninety acres as an addition to that tract. In some respects the title under a mere certificate is considered as equal to a perfect legal title. The land, thus held, descends as realty to the heirs of the deceased holder ; and the patent, when called for, issues to them accordingly. A title by certificate is not a mere chattel interest. It is an imperfect legal title, not a mere equitable interest ; for, when the patent is obtained, the formal legal title conveyed by it relates back to the date of the certificate, and vests the legal title in the patentee, by relation, from that time. A right to include contiguous vacancy is an incident

(a) This case was, by an oversight, not inserted in its proper chronological order.—
 (b) *Hoffman v. Johnson*, 1 Bland, 108 ; *Cunningham v. Browning*, 1 Bland, 325.

to a legal title only ; but when a certificate of survey on any kind of warrant has been returned and compounded on, it then becomes, so far, immediately a legal title, as to draw to itself a similar incidental right to include contiguous vacancy. So that the vacancy, thus surveyed and included, becomes a part, and not an incident of the original tract ; and it is no longer liable to be affected, or acquired by an incidental right of resurvey.

The holders of this land, who claimed by descent from *Aaron Allford*, held one parcel of it by a perfect, and the other by an imperfect legal title. And being thus seised and possessed, they distinctly and specially conveyed that parcel called *Allford's Fancy*, for which they had a perfect legal title, and no more, to *Goodman*, who conveyed the same tract precisely to the petitioner *Hughlett*. In which conveyances there is nothing, that in any manner shews it to have been the intention of *Allford's* heirs to convey the vacancy which had been included by the resurvey called *Aaron's Addition*. *Hughlett* is the purchaser of a part only of the land held by the heirs of *Aaron Allford* ; and consequently, he can have no claim to a patent for that which they held by an imperfect legal title, which they did not convey ; and which was, at the time they conveyed, in no manner to be considered as an incident to that which they actually sold. But was, in fact, a part of the whole number of acres they held, a portion only of which they sold according to the express description of it contained in their deed. The heirs of *Aaron Allford* alone, or those claiming under them, can have a right to complete the imperfect legal title to the ninety acres embraced by the resurvey called *Aaron's Addition* by a patent from the state. (c)

Whereupon it is *Adjudged* and *Ordered*, that the said petition of *William Hughlett* be, and the same is hereby dismissed with costs.

(c) *Cunningham v. Browning*, 1 Bland, 314.

RANDALL v. HODGES.

The original copy of a will of real or personal estate when proved and lodged with the Register of Wills cannot be taken from his possession, except under special circumstances.—The documents and vouchers upon which an account has been passed by the Orphans Court form no part of its records; and therefore, if they have been lodged with the Register of Wills he may be compelled, by a *subpæna duces tecum*, to produce them.

THIS bill was filed on the 25th of August, 1818, by *John Randall* and wife against *Thomas Hodges* and others, the administrators of *Charles D. Hodges*, deceased, praying, that they might be ordered to account for the personal estate of the deceased; and to pay to the plaintiff *Eliza*, the share of the surplus to which she was entitled as one of the next of kin of the deceased. The defendants answered, and by an order of the 17th of June, 1831, the case was, by consent, referred to *Thomas Culbreth* as special auditor, to state such accounts as the nature of the case might require.

The plaintiffs, by their petition, stated, that, in the investigation of the case before the auditor, it had become necessary to have all the vouchers and other papers, filed by the defendants, as administrators of the intestate, in the Orphans Court of Prince Georges county; which vouchers and papers appear to have been filed there for safe keeping only; and do not constitute any part of the records of that court. Whereupon they prayed for a *subpæna duces tecum* to *Philemon Chew*, the Register of Wills of Prince Georges county, commanding him to bring with him those papers before the auditor.

The defendants admitted, that they had no cause to shew against this application, and a *subpæna duces tecum* was, on the 12th of September, 1831, ordered accordingly, returnable forthwith.

The Register of Wills answered on oath, that the judges of the Orphans Court of Prince Georges county, as well as the register, from long settled practice have considered all such papers as office papers, filed in the office for the elucidation of all settlements of accounts in that court; and had uniformly refused to deliver such papers, even to an administrator, according to them copies only; and in no instance recognizing a right on their part to the originals; and that he, the respondent, was willing to furnish attested copies of all the papers required, &c.

1st February, 1832.—BLAND, *Chancellor*.—This matter standing ready for hearing, and having been submitted by the plaintiff's solicitor on notes, and no one appearing on behalf of the Register of Wills, the proceedings were read and considered.

It may be well to observe, that upon the return of a *subpæna duces tecum* the party, so summoned, may in court object to produce the documents; yet, if the objection is overruled, the court will compel the production; (a) it therefore, becomes necessary to consider whether the cause shewn in answer to the *subpæna* can be deemed sufficient.

It is evident, as well from the pre-existing judicial institutions as from the general complexion of the course of proceedings in the now Orphans Court, that those tribunals have been constituted after the manner, and are regulated by the principles of law derived from the Ecclesiastical Courts of England. And therefore, we shall be more likely to procure light and help from the course of proceeding in those English courts, than from any other source.

The question here presented, is whether the written vouchers or proofs upon which an account has been settled in an Orphans Court can be considered as parts of the records or proceedings of that court? For if they do, then it is clear, that the register or keeper of them cannot be called upon to bring them before this or any other court; because, as constituting a part of the public judicial records of the state, they cannot be removed from the place where they are by law directed to be kept; since copies of all such records are made legal evidence for every purpose, and those copies may be obtained by any one on paying the legal fees. It is however, urged, that even supposing they were required to be deposited with the Register of Wills for safe keeping; yet he may be required to bring them into this court, upon the same principle, that, in England, the Register of the Ecclesiastical Court may be compelled to produce an original will.

A will is an instrument of a peculiar character. It is in some respects like a deed of gift, by which the title to property is passed from one to another without any valuable consideration. A deed of gift takes effect in the life-time of all concerned, who may see to

(a) *Field v. Beaumont*, 1 Swan. 209; *Ridgely v. Dorsey*.—Ordered, that a *subpæna duces tecum* issue when applied for.—*Proceedings in Chancery*, lib. W. K. No. 1, fol. 97.—*Beall v. Waggoner*.—Summons issued to P. W. Morgan & C. Conner to produce the respective agreements between plaintiff and defendant lodged in their hands or either of them.—*Chancery Proceedings*, lib. S. II. lett. B. fol. 6.

its proper execution ; but a will can only commence its operation after the death of the donor. A last will is an instrument whereby the author makes a disposition of his property, most commonly, in separate parcels, in different estates, and to a variety of persons, among whom there are, or may be, inutual or conflicting interests to a considerable extent. A will always disposes of property, which, upon the death of its owner, would otherwise, according to its nature, be carried by operation of law in different directions. The personalty, which is the primary and natural fund for the payment of debts, would be placed in the hands of an administrator, who is considered in this court as a trustee for the benefit of creditors and next of kin ; and the realty would devolve upon the heirs. The will, in most respects, follows these different kinds of property, as if it were, in fact, a separate and distinct deed of gift of each. The same solemnities necessary to constitute a valid will disposing of real estate are not required to one which disposes of nothing more than personal property, or in so far only as it disposes of personalty. A probate of such an instrument which is effectual as to personalty is by no means conclusive as to the realty ; and the tribunal before which it is directed to be brought for probate, although clothed with a limited power as to personal property has no sort of jurisdiction in relation to titles to real estates.

Hence, although a will, if it were like an ordinary deed of gift, which conveyed property to no more than one person, might with propriety be entrusted to the custody of the donee alone ; yet it is sufficiently obvious, from the various and rival interests which almost always arise among those who claim under a will, as well as between them and the representatives of the deceased as on his intestacy, that there ought to be some legal place of common deposit where it may be safely kept for the benefit of all concerned ; and that there should also be some mode of having it finally and conclusively authenticated as well in regard to the real as the personal estate.

In England it is the duty of an executor to have the will proved before the Ecclesiastical Court, either in common form, by his own oath, or by the testimony of witnesses ; in case its validity should be disputed. When it has been proved, the original is deposited in the registry, and a copy thereof is made out under the seal of the court, and delivered to the executor, with a certificate of its having been so proved, all which together is usually styled the probate. (b)

The probate by witnesses in the Ecclesiastical Court is conclusive as to the personal estate; (c) but it does not in any degree authenticate the will in so far as it may have made any disposition of real estate; and, consequently, if its validity be questioned as to that, it will be necessary to prove it as fully as if nothing had previously been done. It is a privilege of the heir to have an issue *devisavit vel non* to try the validity of a will; but this privilege may be rejected, as the Chancellor is not obliged, in any case, to send out an issue. (d)

But the Ecclesiastical Court having obtained legal possession of the will, and having become pledged for its safety, in respect to the personal estate, of which it had made some disposition, that court cannot, therefore, allow it to be delivered exclusively into the hands of any one who may claim under it, lest the interests of others might be put in peril; and yet, as regards the realty, it cannot be legally proved unless the original itself be brought before the court and jury, who alone are competent to determine its validity. To remove this difficulty and to prevent injustice, the Court of Chancery has assumed a jurisdiction, upon petition, to order the original will to be delivered by the Register of the Ecclesiastical Court to the petitioner, on his giving bond for its safe return, for the purpose of its being brought before the proper tribunal; or even sent abroad to be exhibited to witnesses who can testify respecting it, but who cannot be brought before the court to whom the question of its authenticity is to be submitted. (e)

In Maryland also, it is the duty of the executor to have the will proved; and, for that purpose, to have it lodged with the Register of Wills of the proper county. But now, as under the Provincial government, there seems to have been but one form of probate, and that is, by the oath of the executor, and also by the testimony of witnesses; and not merely in the one or the other of those forms as in England. (f) After the probate has been thus made here, the will is recorded; and the original will is, in all cases, held for safe custody by the register, as is done by the English Ecclesiastical Court. This practice or common law of Maryland by which

(c) *Toller Executors*, 77.—(d) *Tucker v. Sanger*, 6 Exch. Rep. 49; *Attorney-General v. Burridge*, 6 Exch. Rep. 358.—(e) *Frederick v. Aynscombe*, 1 Atk. 627; *Morse v. Roach*, 1 Dick. 65; S. C. 2 Stran. 961; *Williams v. Floyer*, Amb. 343; *Lake v. Cansfield*, 3 Bro. C. C. 263; *Forder v. Wade*, 4 Bro. C. C. 476; *Carrington v. Payne*, 5 Ves. 411; *Hodson v. ———*, 6 Ves. 135; *Ford v. ———*, 6 Ves. 802.—(f) *Dep. Com. Guide*, 72.

wills are required to be recorded, has been recognized and affirmed by positive legislative enactments. (g) But it appears, that those originals have been very carelessly preserved; for, in some of the counties there are long spaces of time within which, under the Provincial government and since, there are no original wills to be found; although the records of them in the same offices are in a good state of preservation.

It seems, that in Scotland and in Ireland also, the original will itself, when proved, is retained in the office of the court in which it has been authenticated in regard to moveables; and, therefore, if the same will makes any disposition of property in England, it may be proved in the Ecclesiastical Court there by producing a copy only. (h)

But the mere copy of a will made and deposited among the records of a court of another state is not here deemed sufficient to warrant a probate, and the granting of letters testamentary upon it. (i) And, although it is declared by our law, that the Orphans Court may take the probate or cause to be proved any last will or testament, although the same concern the title of lands; (j) yet such a probate has been held to be no more than *prima facie* evidence; and, consequently, if the validity of the will be denied, it must be regularly established here, as in England, according to law. (k) It would, therefore, seem clearly to follow, that here, as in England, if it became necessary to establish a will of real estate, that, on application, this court would lend its aid, and order the register, if the original will were then in his keeping, to deliver it to the applicant, on his giving bond for its safe return, for the purpose of having its validity investigated and determined upon in due course of law; or, considering the original will as being a part of the public records of the state, relief might be had by a special legislative enactment. (l)

(g) 1798, ch. 101, sub ch. 2, and sub ch. 15, s. 9; Carroll's Lessee v. Llewellyn, 1 H. & McH. 162; Smith's Lessee v. Steele, 1 H. & McH. 419; Collins' Lessee v. Nicols, 1 H. & J. 400; Hall v. Gittings, 2 H. & J. 121.—(h) Toller Execu. 71; Robertson on Succession, 281.—(i) Ratrie v. Wheeler, 6 H. & J. 94; Armstrong v. Lear, 12 Wheat. 169.—(j) 1715, ch. 39, s. 2, and 29.—(k) Carroll's Lessee v. Llewellyn, 1 H. & McH. 162; Belt v. Belt, 1 H. & McH. 409; Collins v. Elliott, 1 H. & J. 1; Collins v. Nicols, 1 H. & J. 400; Cheney v. Watkins, 1 H. & J. 533; Massey v. Massey, 4 H. & J. 142; Darby v. Mayer, 10 Wheat. 465.—Since affirmed by 1831, ch. 315, s. 1—passed 14th March, 1832.

(l) The Register of Wills of Baltimore was authorized by a special act of Assembly, to deliver the original will of Robert Burney, deceased, to his heirs, to enable

From this brief review of the law in relation to wills, it is evident, that none of those cases relied on, which shew, that the Court of Chancery has undertaken to have the original will itself taken from the custody of the register and delivered out to a party, or brought before the court for the purpose of investigation and proof, can have any material bearing upon the matter now under consideration.

It may not, however, be amiss to observe, that, in relation to the probate and custody of wills, our law appears to stand as much in need of amendment as that of England. 'I have often thought it a very great absurdity,' says *Chancellor HARDWICKE*, 'that a will which consists both of real and personal estate, notwithstanding it has been set aside at law for the insanity of the testator, shall still be litigated upon paper depositions only in the Ecclesiastical Court, because they have a jurisdiction on account of the personal estate disposed of by it. I wish gentlemen of abilities would take this inconvenience and absurdity into their consideration, and find out a proper remedy by the assistance of the Legislature. But, as the law stands at present, it is not in the power of this court to interpose, so as to stop the proceedings in the Ecclesiastical Court.' (*m*) The original will itself should in all cases, be committed entirely to the safe custody of the Register of Wills, as a part of the documents of his office, for which he should be expressly held responsible; since as an original it can only have authenticity from its being found in its proper place; (*n*) it should be required to be recorded; and if its validity should be drawn in question, either as to real or personal estate, an issue should be made up, to which all who claim under it, and the heirs, should be made parties, to be tried in the county court of the county where the original was kept; and it should be the duty of the Register of Wills to attend and have it with him at the trial. The original will should only be allowed to be taken from the office on its being shewn to be necessary to exhibit it to a witness who could not be made to attend at the trial; and, in such case, the court before which the trial was to

them to establish their title, as such, to lands in Ireland, of which he had died seised in fee simple.—1807, ch. 12. By a similar act the Register of Wills of Worcester, was authorized to deliver the original will of Joseph Delastatus, deceased, for the purpose of having it recorded in Accomack county, Virginia.—1808, ch. 89. And by a special act the Register of Wills of Charles county was directed to transmit the original will of Daniel of St. Thomas Jenifer, to the Court of Appeals, to be there used in a case then depending, and then to be returned.—1822, ch. 117.

(*m*) *Montgomery v. Clark*, 2 Atk. 378.—(*n*) 1 Stark. Evid. 170.

be had, should require bond with surety for its safety. And if any will should not be drawn in question within ten years after it had been recorded, it should be deemed altogether valid and conclusive as well in regard to the real as to the personal estate of which it had made any disposition. (o)

It has been urged that there is nothing to be found in all our extensive and detailed legislative enactments, in relation to the administration of the estates of deceased persons, which authorizes or requires such papers as are now called for to be deposited with the Register of Wills; or their being recorded by him, much less the receiving of any copies of them, which he might give as evidence in any way whatever.

In England neither an executor nor an administrator can be cited by the Ecclesiastical Court, *ex officio*, to account; nor can a creditor who calls an executor or administrator to account before that tribunal be allowed to controvert the account and put him to the proof of its statements. But a legatee, or next of kin, may there call an executor or administrator to account, and controvert every item of the account rendered. And therefore when an account has been so passed upon, it becomes final and conclusive between the parties to it, by the judgment of a competent and proper tribunal. (p)

Here executors and administrators are required to account within a limited time; and, if they fail to do so voluntarily, they may be cited before the Orphans Court and compelled to render an account. The adjusting of such accounts by the Orphans Court appears to be, in most respects, a part of its merely voluntary, or *ex parte* jurisdiction; for it disposes of the whole matter without opposition; and it has not been clothed with the power to entertain jurisdiction of a suit instituted for an account against an executor or administrator, at the instance of any one but a legatee, or next

(o) It has been since declared, by an act passed on the 14th of March, 1832, that every will of which probat shall be taken by any Orphans Court shall be retained in the office of the register, and not delivered out to any person; and every issue of *devisavit vel non* from a Court of Chancery shall be tried in the county of the office, at which trial the said will may be adduced in evidence under the care of the register, or one by him deputed, under a *subpœna duces tecum*, issued on a special order of the court holding such trial; and in like manner such will may be produced in evidence on the trial in any court of this state, of any issue involving the said will, and requiring its production in the opinion of said court; but nothing herein contained shall authorize the keeping said will out of the care and custody of the register.—1831, ch. 315, s. 16.

(p) Toller Execut. 492, 495; Canterbury v. Wills, 1 Salk. 315; Greerside v. Benson, 3 Atk. 253; Anderson v. Fox, 2 Hen. & Mun. 259.

of kin. (*q*) When an executor or administrator presents himself before the Orphans Court, for the purpose of voluntarily rendering an account, it is only authorized to receive and pass the account in a particular manner and upon vouchers of a specified description. The inventory including all chattels real, personal property and debts, due to the deceased, forms the aggregate of the debts or charges; and the payment of debts and expenses as shewn by the vouchers then produced form the sum total of the credits for which he prays to be allowed. After the account is thus adjusted and finished it is recorded. And when the whole estate cannot be finally settled by one account, the executor or administrator is allowed to pass a first, second, &c. accounts, until the whole is closed. (*r*)

According to this course of proceeding in the settlement of the accounts of an executor or administrator, which prevailed under the Provincial government, and has been continued ever since, when the specially described vouchers or documents, from which the account was made, have been allowed by the court; it is said to be proper to set a mark on them denoting the allowance and entry, lest they should happen to be offered a second time, and the estate be doubly charged. (*s*) Whence it clearly appears, that although the account itself is recorded, yet that the vouchers, or the proofs from which it has been framed are never impounded, as in England; (*t*) or retained by the court for any purpose; nor are they made a part of the record, or considered as of themselves, like an original will, forming a portion of the records or proceedings of the court; since, as it is said they are marked; because being at once re-delivered to the executor or administrator they may be offered a second time. (*u*)

These testimonials whereby an executor or administrator sustains his account ought not, certainly, to be allowed a higher degree of importance than similar documents brought before this court by litigating parties. When books and papers are brought into this court, as parts of the necessary evidence in a case, they are, during the time of their being so detained, said to be impounded; and therefore, while so retained here, they cannot be taken from the

(*q*) 3 Blac. Com. 98; 1798, ch. 101, sub ch. 15, s. 12.—(*r*) 1798, ch. 101, sub ch. 10; Dep. Com. Guide, 48; 1831, ch. 315, s. 4.—(*s*) Dep. Com. Guide, 39.—(*t*) *Nielson v. Cordell*, 8 Ves. 146.—(*u*) *Bowyer v. Green*, 6 Exch. Rep. 87.

Chancery office by a *subpœna duces tecum* from any other court. (w) But the party to whom they belong does not relinquish, nor can he be deprived of any right to them merely by their being shewn or brought here as evidence; and therefore they may, after the final determination, be withdrawn at any time, on application, almost as of course on leaving copies; as they do not properly form any part of the pleadings or judicial proceedings of the court. (x)

But it is well established, that the account itself, which has been thus settled and recorded in an Orphans Court, is not, in any respect conclusive, either in favour of or against the executor or administrator; and therefore, it is of the greatest importance to himself, that he should be permitted to retain in his own hands all his vouchers, as the muniments of his account, in case it should be questioned elsewhere, or he should be called to a more rigid settlement before another tribunal. (y)

I am therefore of opinion, that no sufficient cause has been shewn why the papers asked for should not be produced; as they cannot, in any sense, be considered as a part of those public records, proceedings or documents properly belonging to the office of Register of Wills, of which certified copies can be received as evidence.

Whereupon it is *Ordered*, that a peremptory *subpœna duces tecum* issue returnable forthwith.

(w) *Winchester v. Fournier*, 2 Ves. 449; *Rex v. Dixon*, 3 Burr, 1687; *Morris v. Creel*, 2 Virg. Ca. 49; *Harris v. Bodenham*, 1 Cond. Chan. Rep. 143.

COLEMORE v. CARROLL.—Bill, *subpœna*.—Upon proof of service last court, ordered attachment unless appearance.—Answer filed.

19th July, 1725.—*Ordered*, that all books, papers and vouchers in the answer referred to be subjected to the order of this court, and lodged with the register for the complainant's perusal; and that he may take copies thereof, if he thinks proper; and the originals to be returned to the defendant within ten days after lodging them. *Ordered*, that James Carroll, the defendant, pay Mr. Colemore's, the plaintiff's, charge for the copy of those books he lodged, unless he shew cause to the contrary. *Chancery Proceedings*, lib. J. R. No. 1, fol. 98.

ABINGTON v. STODDART.—Bill and answer.

December, 1729.—*Ordered*, that the books and papers referred to in the answer be produced this court in order to be lodged with the register; which were lodged accordingly.—*Chancery Proceedings*, lib. J. R. No. 2, fol. 9.

(x) *Davers v. Davers*, 2 P. Will. 410; *Hodson v. Warrington*, 3 P. Will. 35; *Owen v. Jones*, Anstr. 505; *Maccubbin v. Matthews*, 2 Bland, 251.—(y) *Scott v. Dorsey*, 1 H. & J. 231; *Spedden v. The State*, 3 H. & J. 251; *Gist v. Cockey*, 7 H. & J. 139; *Owens v. Collinson*, 3 G. & J. 37; *Anderson v. Fox*, 2 Hen. & Mun. 259.

POST v. MACKALL.

A defendant shewn to be of unsound mind may have a guardian appointed to answer for him, without issuing a writ *de lunatico inquirendo*.

A decree for a sale of the realty, in a creditor's suit, in general establishes the plaintiff's claim, and the insufficiency of the personal estate.—Where a creditor, of any kind, comes in under the decree he is bound by it; but where there is an outstanding incumbrance, the surplus will not be paid to the defendant to the prejudice of the purchaser.—The statute of limitations cannot be put in by any one who has nothing to protect by it; and when relied on, in general terms, is applied according to the nature of the claim; is only to prevail as it may apply to the representative of the personalty or the realty; and runs up to the time of filing the voucher of the claim.—It enures only to the benefit of him who relies on it.—The effect of an endorsement of payment as evidence to take a case out of the statute. The mode of effecting a distribution where there are conflicting pleas of the statute.—The distinction between simple contract and specialty debts in general, and as regards the statute of limitations.

An absolute judgment against an executor or administrator conclusive as between the parties to it; but not so as between such creditor and the heir; yet the heir may, to that extent, obtain reimbursement from the executor or administrator.—The personal estate must be so disposed of as to leave no superannuated slave a burthen upon it, or upon the public.—The marshalling of assets in what cases it may be made without prejudice to the creditor.—The lien of a judgment, which has been suffered to lapse, cannot be revived so as to overreach any then existing or intervening lien.

THIS bill was filed on the 18th of June, 1829, by *Joel Post*, *Allison Post*, and *Waldron B. Post*, joint traders of the city of New York, and *Henry O. Middleton*, of Virginia, against *Benjamin B. Mackall*, *Edmund Key* and *Margaret* his wife, *Louis Mackall*, *Rebecca Mackall*, *Christiana Mackall*, and *Caroline Mackall*.

The bill states, that the plaintiffs sue as well for themselves as the other creditors of the late *Benjamin Mackall*, who, with the defendant *Key*, was indebted to the plaintiff *Middleton* by several single bills in the sum of \$3,240, which single bills he assigned to the other plaintiffs for a valuable consideration; that, after the death of the late *Benjamin Mackall*, suits were brought on them by the plaintiff *Middleton* for the use of the other plaintiffs against the defendant *Benjamin B. Mackall* and *Richard H. Mackall*, the administrators of the deceased, and the defendant *Key*; that *Richard H. Mackall* died; and absolute judgments were recovered against the administrators, or the survivor of them, for principal, interests and costs, the whole of which yet remains unpaid; that the defendant *Key*, against whom also judgments were obtained,

had taken the benefit of the insolvent law, and was then utterly insolvent; that the late *Benjamin Mackall* died, leaving a considerable real and personal estate; and these defendants, except *Edmund Key*, his children and heirs at law; that his son *Richard H. Mackall*, had died intestate and without issue; that the defendant *Benjamin B. Mackall* had become a lunatic; in consequence of which the administration granted to him had been revoked, and administration *de bonis non* had been granted to the defendant *Louis Mackall*; and that the personal estate of the intestate was wholly insufficient to pay his debts. Whereupon the bill prayed, that the real estate might be sold for the payment of the debts of the intestate, &c.

The plaintiffs by their petition, filed on the 25th of June, 1829, stated, that the defendant *Benjamin B. Mackall* had been returned summoned; that, as alleged in their bill, he was proved, by the annexed certificates of the attending physician of the Hospital at Baltimore, in which he was then confined, to be a lunatic; but that no commission of lunacy had ever been issued against him. Whereupon they prayed, that a guardian might be appointed to appear and answer for him, &c.

26th June, 1829.—BLAND, Chancellor.—This petition having been submitted, the proceedings were read and considered.

The bill alleges, that one of the heirs, *Benjamin B. Mackall*, is a lunatic, and prays a *subpœna* against all the heirs, in the usual form, to appear, 'the said *Benjamin B. Mackall* by guardian to be appointed in his behalf to answer,' &c. It is not alleged, and it is admitted, that *Benjamin B. Mackall* has not been regularly found and declared to be a lunatic.

A *subpœna* was issued against him to which the sheriff has returned, 'summoned, see certificate;' which certificate annexed to the writ is in these words. 'This is to certify, that *Mr. Benjamin Mackall*, has been resident in the Maryland Hospital for the last ten months, and is still there; and, during that period, has been of unsound mind and incapable of the management of himself and his affairs.—*John P. Mackenzie*, attending physician.—22d June, 1829.'

At law it is clear, that the lunacy of the defendant affords him no exemption from arrest in civil cases; nor can he be discharged without bail, in any case where, if sane, he might be held to special bail. (a) And it appears to be understood, that a lunatic de-

(a) *Steel v. Alan*, 2 Bos. & Pul. 362; *Pillop v. Sexton*, 3 Bos. & Pul. 550.

fendant in Chancery must be served with process, or summoned in like manner as if he were sane. (b) But the committee, or legally appointed trustee of such lunatic, if he has one, who is not interested in the case, is always appointed, as of course, his guardian *ad litem*. If the committee be adversely interested, or the lunatic has no committee, then the court will, on application, appoint a guardian to answer for him. (c) The awarding of a commission of lunacy is not an absolute matter of right, but rests in the sound discretion of the Chancellor. It may be withheld where no good is likely to result from it. In this instance, the expense of the commission could only be paid out of the fund, already, perhaps, exceedingly deficient, which should be appropriated altogether to the benefit of the creditors of the deceased; in which, and in many similar cases, because of the poverty of the lunatic, as well as with a view to his proper personal treatment, the court will act upon the fact of his being actually in a condition of mental incapacity as fully as if he had been found to be *non compos mentis* by a regular inquisition. (d)

Hence where the court is satisfied, as in this instance, by a certificate of the attending physician of the hospital in which the lunatic has been placed, or by such other proof as the nature of the case will admit, that the intellectual infirmity of the defendant is such, arising from madness, age, or any other cause, as to render him unable to manage his own affairs, on application a guardian *ad litem* may be appointed for him, and charged to defend the suit on his behalf. (e) So on the other hand, that the rights of such an

(b) *Carew v. Johnston*, 2 Scho. & Lefr. 292.—(c) 2 Mad. Pra. 333; Mitf. Plea. 104; *Snell v. Hyatt*, Dick. 287; *Lloyd v. —*, Dick. 460.—(d) *Sherwood v. Sanderson*, 19 Ves. 289; *Ex parte Tomlinson*, 1 Ves. & Bea. 57; *Brodie v. Barry*, 2 Ves. & Bea. 36; *Ex parte Evelyn*, 7 Cond. Cha. Rep. 232; *Exeter v. Ward*, 7 Cond. Cha. Rep. 258; *Rebecca Owings' case*, 1 Bland, 290; *Colegate D. Owings' case*, 1 Bland, 372.—In the matter of *Ann Oliver*, 29 Com. Law Rep. 165 —(e) Mitf. Plea. 104; *Leving v. Caverly*, Prec. Chan. 229; *Sheldon v. Aland*, 3 P. Will. 111, n.; *Wilson v. Grace*, 14 Ves. 172; *Barrett v. Tickell*, 4 Cond. Cha. Rep. 70; *Howlett v. Wilbraham*, 5 Mad. 423; *Carew v. Johnston*, 2 Scho. & Lefr. 292.

WORTHINGTON v. CRADDOCK.—Bill for a conveyance in specific performance of the agreement of the deceased ancestor of the defendants. *Subpœna* issued and returned summoned. A writ *de idiota inquirendo* issued to enquire into the idiocy of the defendant Eleanor Worthington. Inquisition taken and returned finding her an idiot, which being confirmed, John Craddock was appointed her committee, required to give bond, &c. Whereupon John Craddock and Benjamin Nicholson were appointed a committee for the idiot, to take her answer and defend the suit in her behalf.

October, 1784.—*Decreed*, that a conveyance be made as prayed; and that a day be given to the infants to shew cause on their coming of age as usual. But there was no reservation as to the idiot.—*Chancery Proceedings, lib. No. 2, fol. 135, 265, 272.*

imbecile person, who has instituted a suit, may be taken care of, and that he may be enabled to perform a duty, his solicitor may be directed to sustain and prosecute the suit for his benefit; or a guardian may be appointed for the special purpose of executing the act required, according to the nature of the case. (*f*)

Whereupon it is *Ordered*, that *Louis Mackall* be and he is hereby appointed guardian of the defendant *Benjamin B. Mackall*, to make answer to the said bill of complaint in his behalf, and in all respects to defend and protect his interests in this suit.

On the 27th of April, 1830, the lunatic defendant answered by his guardian. The other defendants put in their answers, in which they all admitted the claims of the plaintiffs; that the personal estate of the deceased was insufficient to pay his debts; and consented, that a decree should pass as prayed.

4th May, 1830.—BLAND, Chancellor.—Decreed, that the real estate of *Benjamin Mackall*, deceased, be sold; that *John Johnson* and *Thomas S. Alexander* be appointed trustees to make the sale, &c.; the terms of which shall be, one-third of the purchase money to be paid in six months, one other third in twelve months, and the residue in eighteen months from the day of sale; with interest from the day of sale, &c. That notice be given to the creditors of the deceased to file the vouchers of their claims within four months from the day of sale. And that the defendant *Louis Mackall*, the administrator *de bonis non* of the deceased, account, &c.; which account the auditor is directed to state from the evidence now in the case, and such other evidence as may be produced before him by either party, on giving the usual notice, &c.

After which the trustees reported that they had given notice to the creditors; and had made sales of the real estate of the deceased on the 26th of July, 1830, to the amount of \$10,275 92; which were finally ratified on the 20th of November, 1830.

On the 10th of February, 1831, the plaintiffs filed their bill in the nature of a supplemental bill against *Christiana Mackall*, the widow of *Benjamin Mackall*, deceased, in which they state, that in pursuance of the decree of the 4th of May, 1830, and the notice to creditors, *The President, Directors and Company of the*

(*f*) 1 Fonb. Eq. 64; Donegal's case, 2 Ves. 408; *Wartnaby v. Wartnaby*, 4 Cond. Cha. Rep. 173; *Colegate D. Owings' case*, 1 Bland, 372.

Bank of the United States, amongst other creditors, filed their claims in this court, one of which is secured by a mortgage of the real estate of the deceased, which had been sold by the trustees, which mortgage was executed by the deceased; and to which there is a release of all the right of dower of *Christiana Mackall*, the now widow of the deceased; that they, the plaintiffs, with all the other creditors of the deceased, are entitled to the benefit of the mortgage, so as to have the same, and especially the dower right, applied to the discharge of the mortgage debt in exoneration of the other estates of the deceased; and to have and use the name of the *Bank* for that purpose; that before the passing of the decree of the 4th of May, 1830, in this case, by a proceeding in Prince Georges County Court, a part of that real estate of the deceased, mentioned in the proceedings, had been assigned to this defendant, *Christiana*, as her dower, upon which she had entered, and was then in possession, receiving the rents and profits to her own use; and that as the decree of the 4th of May had only been obtained against the heirs at law of the deceased, it would not bind the right of this defendant. Whereupon they prayed, that the land which had been assigned to the widow for her dower might be sold, &c.

The auditor, on the 2d of March, 1831, reported, that he had made a statement of the claims of creditors numbered from one to thirty-three, together with two statements marked A. and B. of the account of *Louis Mackall*, the administrator *de bonis non* of the deceased. The auditor, in this report among other things, says, the claim of *The Bank of the United States*, marked No. 4, is secured by a deed of trust to *Richard Smith*, dated 10th October, 1821, of the real estate of the deceased, and the negroes therein mentioned; this claim is proved in the usual manner, and will be allowed as a lien of that date. The claim of the same *Bank*, No. 5, is stated in the affidavit to be secured by a conveyance of certain negroes to *Richard Smith*, dated the 12th of January, 1831, of which there is no proof. The only evidences of the claims of the same *Bank*, marked No. 6 and 7, are short copies of judgments against the administrator of the deceased, which are not proved in the usual manner. The claim of the same *Bank*, No. 8, is an account which makes the deceased debtor to it as assignee of the Bank of Columbia for the amount of sundry notes due at his death. For which notes, it is alleged, on the death of *Benjamin Mackall*, *Benjamin B. Mackall*, his son, gave his note, dated 25th Septem-

ber, 1823, for \$4,025, endorsed by *Christiana Mackall*, *Louis Mackall*, *Rebecca Mackall*, and *Christiana Mackall*, these being the widow and all the heirs of *Benjamin Mackall* competent to sign, which was reduced to principal \$4,000, and interest thereon paid to 5th of August, 1826; on which day the note became due, and has been lying under protest ever since. It is also stated, that this debt is secured by a deed of trust on three and seven-eighths acres in Georgetown, executed subsequent to that given to secure claim No. 4. This claim, No. 8, is not proved in the usual manner.

The auditor further says, that the claims No. 9, 10, 12, 13, 14, 15, 18, 19, 20, 21, 23, 24, 25, 26 and 28, are evidenced by short copies of judgments recovered against the deceased administrator, and should be allowed as against the personal estate; but they are not proved as against the real estate. Claim No. 29, is also admitted by the administrator, but is not proved as against the real estate. The proof of claim No. 11, is a short copy of a judgment; *George Biscoe and George W. Biscoe v. John P. Greenfield*, which is entered for the use of *Robert W. Bowie*, with the affidavit of said *Bowie* in the usual form. It is stated that this judgment was superseded by *Edmund Key* and the deceased; that a *scire facias* was issued and judgment recovered against the principal and his sureties. The auditor thinks a short copy of the last judgment should be produced with the affidavits of the original creditors and the assignee; and proof of the insolvency of the original debts. The insolvency of *Key* is established by the pleadings in this case.

The auditor further says, that the claim No. 27, is on the bond of *Edmund Key* and the deceased. The insolvency of *Edmund Key* is supposed to be established by the pleadings. The claim No. 30 is not proved. And upon the circumstances stated by the claimant himself, the auditor thinks it cannot be proved as a claim against the estate of the deceased. *Edmund Key*, the claimant, states, that he held a judgment against a certain *William Thornton*, which he assigned to *Benjamin B. Mackall*, administrator of the deceased, to pay certain endorsements of *Benjamin Mackall* for him. He afterwards agreed, that *Louis Mackall*, the administrator *de bonis non*, might apply the sum of \$400, part of the proceeds of the judgment, to the payment of a claim of *The Bank of the United States* against the deceased; and he therefore claims to be substituted in the place of the *Bank*, and to be considered as a preferred creditor to the amount of that payment. The plaintiff's claims

No. 1, 2, and 3, which are stated to the amount of \$4,695 72 are on the joint and several obligations of the deceased and *Edmund Key*, who is responsible for the moiety thereof. And claim No. 6, is against the deceased as an endorser for *Edmund Key*, and is stated to amount of \$1,469 51. And claim No. 27, is against the deceased as surety on a bond which is stated to amount of \$6,099 61. The auditor thinks, that the amount of the claim No. 30, if established, should be retained to answer any sum which may be recovered against the deceased's estate on account of claims No. 6, and No. 27, or the moiety of claims No. 1, 2, and 3, for which the defendant *Edmund Key* is liable. The defendant *Edmund Key*, by letter to the auditor, has also advanced a claim, on behalf of his wife *Margaret J. Key*, for the value of certain negroes, her separate property, which were sold by *Benjamin B. Mackall*, the former administrator, and applied to the use of the estate of the deceased. No proof has been offered to sustain the claim; nor any data from which the auditor could state the probable amount. The auditor proposes when the proper materials are furnished to state the claim as No. 31. And lastly, that claim No. 33, is not proved in the usual manner.

The auditor further says, that no proof had been furnished to him of the assets in the hands of *Benjamin B. Mackall*, surviving administrator, from which he could state an account. The defendant *Louis Mackall*, the administrator *de bonis non*, has filed certain papers from which the auditor has stated an account A.; such as he supposes would be desired by him. But to the items of that account No. 1, 2, 3, 4, 5, 6, 7 and 8, the auditor objects; because, they are for moneys paid by the administrator in full of judgments recovered by creditors of the deceased against the administrator, as he understands; whereas the personal estate appears to be deficient, and therefore dividends only of said claims should be allowed. No. 10, and 11, are for payments made to *The Bank of the United States* on account of its claims. As the payments are less in amount than the dividends which may be allotted to the *Bank* on its claims, they ought to be allowed. But it does not distinctly appear, that credits have been allowed to it for those payments. There is no evidence of the payment of the sum of \$16, and \$75, for officer's fees in 1824, and 1829; and the auditor is unable to determine, from the papers before him, whether the allowance of \$124 97 to be retained for officer's fees, yet due, is correct. There is no proof, that the negroes for whom an allowance is claimed, to

amount of \$1,005, were mortgaged to *The Bank of the United States*, as is alleged. They have not been taken out of the possession of the administrator; and the auditor thinks they should be accounted for by him, as a part of the personal estate of the intestate, leaving the *Bank* to prove its claim as it may think proper. The commission allowed is supposed to be correct, as the act of 1798 limits the allowance to ten per cent. on the amount of the inventory. This account A. is also supposed to be erroneous, as no interest is allowed on the amount of the estate in the hands of the administrator. The auditor has therefore, stated an account B. from which the aforesaid objectionable items are excluded. The commission is allowed on the amount of the inventory, and interest charged from fifteen months after the date of the letters of administration.

To this report, the plaintiffs, whose claims are No. 1, 2, and 3, on the same day filed the following exceptions. They except to claim No. 4; because the same is secured by a deed of trust from the debtor to *Richard Smith* of certain real estate in the District of Columbia, where the claimant is situated or resident; and which is not liable for the claims of the complainants and other general creditors; and the complainants insist, that the said creditors should enforce it in the name of said creditor, or that the said security should be assigned for their benefit before any part of the fund, created in this cause, should be applied to payment of said claim. They except to claim No. 5; because it is barred by limitations; and because an absolute judgment was recovered, on the same cause of action, against *Benjamin B. Mackall* and *Richard H. Mackall*; and the said judgment is evidence, that the personal estate in the hands of the said administrators was sufficient to pay said claim; and therefore, bars the said claim as against the real estate, and the personal estate in the hands of the administrator *de bonis non*. They except to claims No. 6 and 7; because they are not proved in the usual manner; and also for the same reasons stated in their exceptions to claim No. 5. They except to claim No. 8; because it is not proved in the usual manner; because it is barred by limitations; because it was satisfied by the notes of *Benjamin B. Mackall*, &c. which is stated and mentioned in said claim; and because it is admitted, that the said claim is secured by a deed of trust of real estate in the District of Columbia, where the claimant resides or is situated; and the said real estate should be first applied to the payment of said claim in exoneration of the fund raised in this cause. They except to claim No. 27; because the

said *Benjamin Mackall*, deceased, was surety on a bond for *Edmund Key*, which bond was given for the purchase money of a tract of land in Prince Georges county; and that the said land is ample security for said debt, and should be applied to its payment in relief of the estate of the deceased party.

The Bank of the United States, on the 27th of March, 1831, as claimants No. 4, 5, 6, 7, and 8, also filed exceptions to this report of the auditor. To the plaintiffs' claims No. 1, 2, and 3, for that there is not legal evidence to support said claims; and that the same are barred by the statute of limitations. To claim No. 9; for that the voucher in support of said claim is not legal evidence thereof in this suit; and also, for that the same is barred by the statute of limitations. To claims No. 10, 11, 12, 13, 14, 16, 17, 18, 19, 21, 22, 23, 24, 26, 27, 29, 30, 32, and 33; for that there is no legal proof in support of either of said claims; and that each of them is barred by the statute of limitations. To all the before mentioned claims, they object, that judgments against the administrators of the deceased are no evidence in a suit instituted for the sale of the real estate; and that the original vouchers, or legal evidence of its existence, if there be any, not being exhibited within the time prescribed by law; and that the same are barred by the statute of limitations. These exceptants moreover insist upon the right to urge these objections as well against the claims of the complainants, as of the other claimants; because these exceptants were not made parties to the bill, and had no opportunity of contesting the same before the decree; and because, if said claims were allowed, although the original defendants to the suit may not be injured thereby, and therefore had no motive for insisting on the objections herein before stated; yet the fund for the payment of the *bona fide* claims of this exceptant would be greatly diminished, and rendered insufficient to pay what is due.

The plaintiffs, by their petition, stated, that among others of the creditors of the deceased, *The Bank of the United States* had filed sundry claims for moneys due to it at its office of Discount and Deposit at Washington in the District of Columbia; and alleged, that one or more of the said claims are secured by a conveyance of a part, or the whole of said real estate, made by the deceased to a certain *Richard Smith*, cashier of said *Bank*, in trust for its use; and they submit, that the said lien shall be respected in all the proceedings in this case. That the *Bank*, by filing its claim, has become a party to this case; but, as the trustee *Richard Smith*

is no party to this case, there may be some doubt, whether the trustees under the decree of the 4th of May, 1830, can convey good titles to the purchasers from them. Whereupon, the plaintiffs prayed, that the *Bank* might be required to procure its trustee *Smith*, to convey the real estate so held in trust by him, to the trustees appointed by the decree in this case, in order, that they might convey good legal titles to the purchasers, &c.

3d March, 1831.—BLAND, *Chancellor*.—It is a well settled principle, in relation to creditors' bills, that where a creditor comes in after the institution of the suit, by filing the voucher of his claim or otherwise, he and all who have an interest in the claim, either as trustee, or *cestui que trust*, do thereby, to the full extent of their respective interests, as expressed by such voucher, become parties to the suit, and are bound accordingly by the decree in favour of the purchasers under it; and also as regards all others who were originally or may afterwards be considered as parties to the suit. (*g*) It is true, that in cases of this kind, where mortgagees, or other like incumbrancers, are not made parties, or do not come in, they are untouched by the decree; but if they once come in and consent to the sale, or claim under the decree they are bound by it. (*h*) But, in general, for the protection of purchasers, the surplus of the proceeds of the sale will not be paid to the mortgagor, his inheritor, or a defendant, where it is shewn, that there are outstanding incumbrancers who have not come in, or been made parties to the suit; and the sale has not been made subject to such incumbrances. (*i*) Hence it would be wholly unnecessary and improper to order a conveyance, as prayed by this petition.

Whereupon it is *Ordered*, that the said petition be and the same is hereby dismissed with costs.

The defendant *Christiana Mackall*, not having answered the bill filed on the 10th of February, an interlocutory decree was passed against her according to the act of Assembly; (*j*) and a commission was issued and returned, but without any testimony. Whereupon it was *Decreed*, on the 24th of March, 1831, that the trustees appointed by the decree of the 4th of May, 1830, make sale of the real estate, clear of all claim of this defendant *Christiana Mackall*

(*g*) Mitf. Plea. 249; *Hammond v. Hammond*, 2 Bland, 349, 388.—(*h*) *Kenebel v. Scrafton*, 13 Ves. 370; *Hammond v. Hammond*, 2 Bland, 388.—(*i*) *St. Antonio v. Adderly*, 12 Cond. Cha. Rep. 372.—(*j*) 1820, ch. 161, s. 1.

for dower as widow of the late *Benjamin Mackall*. After which the trustees reported, that they had, on the 15th of October, 1831, sold all those parts of the real estate which had been assigned to her for her dower; which sales were finally ratified on the 20th of January, 1832.

10th November, 1831.—BLAND, Chancellor.—On motion it is Ordered, that the report of the auditor, together with all the exceptions thereto; and also all the objections to the claims of the creditors, stand for hearing on the 25th day of January next; and that the parties and creditors be and they are hereby authorized to take testimony in relation to the said report and claims of creditors therein mentioned, before any justice of the peace, on giving three days notice as usual; *Provided*, that the said testimony be taken and filed in the Chancery Office, on or before the tenth day of January next. But to avoid unnecessary delay and trouble; and at the same time to ensure an effectual investigation of the merits of each subject of litigation, it is to be understood, that the notice of the taking of testimony required to be given, must be to the creditor against whose claim the testimony proposed to be taken is to be directed; and if the testimony is proposed to be taken by a creditor in support of his claim, then he must give notice to the defendants in the case or their solicitor; or to two or more creditors or their solicitors.

The auditor, on the 24th of January, 1832, made a further report, in which he says, that he had examined four additional claims, lately filed in this case, and stated them as No. 34, 35, 36 and 37; that the claim No. 34, is a single bill of the administrator *de bonis non*, of the deceased; and is therefore admitted as against the personal estate; that the claim No. 37 is on a bond executed by *Edmund Key*, *Aquila Beall*, and the deceased, with a condition, that *Key* should prosecute an appeal from a judgment recovered against him by the obligees. A short copy of a judgment against the administrator *de bonis non*, on this bond, is also filed, which proves the claim as against the personal estate. But, in order to prove it as against the real estate, the auditor thinks some evidence must be offered as to the determination of the appeal; and that only one-half of the claim ought to be allowed, unless it is proved, that *Aquila Beall* is insolvent.

After which the plaintiffs, on the 25th of January, 1832, filed the following additional exceptions, in which they insist upon their

exceptions heretofore filed against the claims of *The Bank of the United States*. And also except to so much of the auditor's report as in any manner conflicts with their aforesaid exceptions. They except to the auditor's account A. between the administrator *de bonis non*, and the estate of the deceased, for all and every the reasons which are set forth and assigned as objections to said account in the auditor's report; except, that objection of the auditor against the allowance for \$1,005, for the value of negroes mortgaged, the mortgage having been produced and admitted. They also except to so much of the accounts A. and B. of the administrator *de bonis non*, as stated by the auditor, as make allowances to him for moneys paid for county taxes; for county taxes remaining due, and for the future support of the negroes.

The creditors of the deceased, reported by the auditor as claimants No. 9, 10, 12, 13, 14, 15, 16, 17, 21, 23 and 24, at the same time, prayed leave to insist upon all the exceptions taken by the plaintiffs to the reports of the auditor, and to have the same benefit thereof as if they were again specially repeated. And, on the same day, *The Bank of the United States* excepted to all four of the claims stated by the auditor in this his last report; because they are barred by the statute of limitations; because No. 34 is founded on a single bill by the administrator *de bonis non*, and can be no evidence of a claim against the deceased; and because there is no evidence to support claim No. 37.

Instead of taking testimony under the order of the 10th of November, the parties, by agreements filed, made what they deemed sufficient admissions of the authenticity of the vouchers of some of the contested claims, so as to bring the case before the court.

14th February, 1832.—BLAND, *Chancellor*.—This case standing ready for hearing and further directions on the several reports of the auditor, and the exceptions thereto, and the solicitors of the parties having been heard, the proceedings were read and considered.

The court is now called on to have the assets of this deceased debtor so distributed as to produce the greatest amount of satisfaction to his several creditors; all of whose claims have been either expressly admitted, or left unopposed by his legal representatives. But some of these creditors, by relying on the statute of limitations and other exceptions against their rival and co-creditors, have endeavoured to protect their own satisfaction from being lessened, by an application of any part of the assets to the discharge of the

claims to which they have thus objected. Some others of these creditors have obtained absolute judgments against the administrators of the deceased debtor, which, it is insisted, should be treated as a complete exoneration of his real estate; others of them have specific liens on the property from which the proceeds now to be distributed have been raised; and one of them holds a lien, as a security for its debt, on land lying beyond the jurisdiction of this court; thus altogether presenting a complexity of conflicting interests and equities of unusual occurrence.

According to the mode of proceeding under a creditor's bill, each creditor is allowed to come in without any other formality than the mere filing of the voucher of his claim; and to be thenceforward considered as a party to the suit. (*k*) If the statute of limitations, as in this instance, be relied on, in general terms, as against any claims, that period of limitation must be understood as having been intended to be insisted on, which is properly applicable to the nature of the claim; as where it is founded on a mortgage of the realty twenty years, if on a judgment or specialty twelve years, and if on a simple contract three years must be considered as the bar relied on. If the statute of limitations be relied on generally by a creditor against the claim of a co-creditor, it can be allowed to prevail only in so far as it is applicable to the representative holding the real or personal estate of the deceased who it is proposed to charge in respect of such assets; as where the claim was merely a simple contract debt due from the deceased, upon which a judgment had been recovered against, or a promise of payment made by the executor or administrator, the claim could not be barred as such against the executor or administrator; because of such judgment or promise; but as that cannot bind the heir or devisee, the claim will not be allowed against him if barred as a mere simple contract debt. The day of filing the voucher of the claim is, as to it, the date on which the suit for its recovery was instituted; and up to which the statute of limitations, if relied, is allowed to run. (*l*) All objections to claims, thus coming in under the decree, are received in the shape, most usually, of exceptions made, as in this instance, upon which the court looks only at the true nature and substance of the objection.

But it has been laid down, that if a creditor has obtained an ab-

(*k*) *Hammond v. Hammond*, 2 Bland, 365.—(*l*) *Welsh v. Stewart*, 2 Bland, 41; *Serndale v. Hankinson*, 2 Cond. Cha. Rep. 198.

solute judgment against the executor or administrator, although it must be deemed conclusive of a sufficiency of personal assets, as between the creditor and the executor or administrator; yet it shall not be so held as between the creditor and the heir or devisee, so as to exonerate the real estate; but that an insufficiency of the personalty may be shewn by the creditor for the purpose of letting himself in upon the realty. (m) And it has also been laid down, that a plea of the statute of limitations shall only enure to the benefit of him who pleads it under a creditor's bill; and consequently, in this case, where the statute of limitations can be sustained as a bar to any claim, it can only be allowed so to operate as to exclude them from coming in conflict with, or receiving any thing to the prejudice of the claim of him by whom the statute of limitations was pleaded. (n)

(m) *The State v. Cox*, 2 H. & G. 379; *Iglehart v. The State*, 2 G. & J. 245; *Gaither v. Welch*, 3 G. & J. 259; *Ellicott v. Welch*, 2 Bland, 247.

(n) *McCORMICK v. GIBSON*.—This bill was filed, on the 19th of January, 1824, by James McCormick, jr., against Fayette Gibson, Edward R. Gibson, Nancy Gibson, Rebecca Gibson, Thomas P. Bennett and Harriet his wife, Joseph W. Reynolds and Ann his wife, James Tilton and Frances his wife, Clara Tilton, Nehemiah Tilton, Rigby Hopkins, John W. Blake, Edward Lloyd, and the President, Directors and Company of the Farmers' Bank of Maryland.

The object of the bill was to have the real estate of Jacob Gibson, deceased, sold, because of the insufficiency of his personal estate, for the payment of the amount then due on a promissory note given by him for \$2,500, which had, by several endorsements, passed into the hands of the plaintiff. On the 10th of November, 1824, the defendant James Tilton, put in his answer. On the 27th of September, 1824, the defendant Edward Lloyd, filed his answer. On the 12th of October, 1824, the Bank made answer, stating its defence; and shewing, that it held, as a security for its claim, a mortgage given by the deceased, of his tract of land called Marengo; but the deed of mortgage contained no relinquishment of the right of dower of the wife of the grantor; nor any personal covenant for the payment of the money.

On the 4th of February, 1825, the defendants Bennett and wife, filed their answer, in which, among other things, they say, 'that they have always well hoped and believed, that the personal estate of the said Jacob Gibson, together with the proceeds of the sales of the property by him devised to be sold, and the rents and profits of the real estate, as directed by the last will and testament of the said Jacob Gibson, to be applied towards the payment of his debts, would have been amply sufficient to discharge the same, and all expenses of administration, had the administration thereof been conducted according to the intentions of the said Jacob Gibson as expressed in his said will; but these defendants allege and say, that the said personal estate of the said Jacob Gibson, or the greater part thereof, was retained and not sold till nearly two years after his death, and thereby a considerable loss was incurred by the estate; that the real estate retained by the executor was greatly mismanaged by him, and the profits thereby considerably diminished; that the land purchased from Samuel Y. Garey and wife, which was ordered to be conveyed to Henry Grace, in case he would pay the price or purchase money contracted by him to be paid to the

With a recollection of these established principles, it will be necessary to take a general survey of these claims, in order to un-

said Jacob Gibson, for the same, was sold by the executors to other persons at a much less price, and was denied to the said Henry Grace, as these defendants have been informed, although he offered to pay for the same the price he had contracted to give, by which means a loss of upwards of five hundred dollars was incurred, and that the said executor has altogether omitted to charge himself with the proceeds of the sale of said land. That the suit between the said Jacob Gibson and James Tilton, jun., respecting certain negroes of considerable value was given up by the said executor Edward R. Gibson, and not prosecuted by him; that \$2,063 62 worth of property, which was appraised, was never sold; but alleged by the executor aforesaid, to have been either lost, worn out, used in the family, or not worth being sold; that the said executor received an allowance of ten *per cent.* commission on \$21,972 47, the amount of the personal assets returned by him, instead of six *per cent.* commission, as was the wish of the said Jacob Gibson; that the said executor also charged the estate for expenses incurred by him in making crops of wheat and Indian corn, &c. in the years 1818, and 1819, amounting to the sum of \$14,342 50, the enormous sum of \$6,512 67, and was allowed the same.'

On the 15th of July, 1825, the defendants Fayette Gibson and Blake, filed their answers; the non-resident defendants having failed to answer as warned by publication, and the other defendants having also failed to answer, the case was brought before the court; and on the 22d of January, 1828, the bill was dismissed by the Chancellor with costs; as to which, see 3 G. & J. 13. The reasons and grounds of the Chancellor's decree having been more fully considered in the analogous case of *Lingan v. Henderson*, 1 Bland, 236. From this decree the plaintiff appealed; and the case having been brought before that tribunal was heard by it as constituted of Judges *Buchanan, Martin* and *Dorsey*.

13th July, 1831.—*The Court of Appeals*.—This case having been argued by the counsel for the appellant, and considered by the court; and, for as much as it appears, that there is error in the decree of the Chancellor, the plea of limitations, filed in the cause, not operating as a bar to all relief; but only as a protection to the interest of the party pleading it, in the land sought to be affected by the bill of the complainant; and the court being of opinion, that the appellant was entitled to relief.

It is therefore *Decreed*, that the decree of the Chancellor passed in this cause be and the same is hereby reversed with costs in this court. And that the said cause be remanded to the Court of Chancery, and that the Chancellor pass such order and decree in the premises as justice and equity may require.

For the opinion of the Court of Appeals on which this decree was founded, see 3 G. & J. 16.—This decree, a certified copy of which was filed in this case, appears to have been signed by Judges *Martin* and *Dorsey* only. The constitution declares, that the Court of Appeals shall be constituted of six judges, all of whom are competent to sit on every appeal from the High Court of Chancery; and the constitution also declares, that 'any three of the said judges of the Court of Appeals shall form a quorum to hear and decide on all cases pending in said court.' Hence, it would seem, as every decree must be signed, as in the English Court of Exchequer, by every judge who was present at the making of it, 2 *Fowl. Exche. Pra.* 168, to make a valid decree in equity by the Court of Appeals, it should be signed by at least three judges. The county courts are constituted of three judges, any one of whom is made competent to hold a court; and, consequently, a decree of a county

derstand the nature of the directions which the court is now called upon to give respecting them.

court signed by any one of its judges, because of his being the court, must be deemed valid.

After various other proceedings, for the principal part of which see 10 G. & J. 67, this case was again submitted for a final determination.

13th May, 1836.—BLAND.—*Chancellor*.—It will be seen, by adverting to the proceedings, that the defendant James Tilton, in his answer, relied on two distinct grounds of defence, each of which apparently, covered the whole of the plaintiff's cause of suit as regarded the real estate of the deceased; *first*, the statute of limitations; and *secondly*, the sufficiency of the personal estate of the deceased to pay all his debts. Considering the reliance upon the statute of limitations, if sustained, as an entire bar, it was obviously unnecessary to say any thing as to the sufficiency of the personalty. And, on the reliance upon the statute by this defendant being declared, by the Court of Appeals, to be only a protection of his interest in the realty, it could not be proper, upon any allegation of his only, to call for an account of the personalty, because his interests having been thus fully protected, the taking of any such account, at his instance only, might well be regarded, in relation to all others, as an impertinent and unnecessary interference with the further progress of the case. The same principles apply to the answer of Clara Tilton, who, in her answer, made after she had attained her full age, has, in like manner, relied upon the statute of limitations and the sufficiency of the personal estate.

It appears, however, that the defendants Bennett and wife had also, in their answer, relied on the sufficiency of the personal estate and the other appropriated funds. That that allegation of theirs had been distinctly placed, by the record, before the Court of Appeals; and, if available, in any degree, in favour of the realty, seems to have necessarily called for a decree or direction from that tribunal, that an account be taken of the personalty; as usual, in all cases of this kind, where the alleged insufficiency of the personalty or appropriate fund is contested by an heir or devisee.—*Campbell's case*, 2 Bland, 225; *Hammond v. Hammond*, 2 Bland, 347, 354.—But, as nothing has been said by that tribunal as to any such account, this court may now, therefore, treat it as a conceded or established fact, that the personal estate of the deceased, including so much of the profits and the sales of his real estate as he had appropriated to the payment of his debts are insufficient for that purpose; and proceed accordingly to direct the real estate indiscriminately to be sold.

The defendant Rebecca Gibson has had her claim, in lieu of dower, under the will of her deceased husband, brought fully before the court, by the bill of complaint; and, yet she has made default, and still remains silent and passive. The devise to her, in lieu of dower, may be entirely equivalent in value to her legal right; and by her acceptance of it, as such, it must be presumed, that she has hitherto so regarded it. No one of these parties has objected to the having of it, or of her dower awarded to her, in kind, or in any other form. This devise to her, in lieu of dower, is one of singular complexity, and difficult to be disposed of, with a due regard to the interests of the devisees, and the creditors of the deceased. For, as regards the mortgaged estate, there being no personal covenant in the mortgage deed for the payment of the money, it follows, that in so far as this incumbrance in lieu of dower should be thrown upon it, so as to leave any balance unsatisfied, the claim for such balance would be thereby reduced to the grade of a mere simple contract debt, so as in that, and in other respects, to be regarded as a devise to the prejudice, and in fraud of creditors, and void under the statute.

Where one creditor may, to obtain satisfaction, have recourse to two funds, and another creditor of the same debtor can only resort

Therefore such a decree, as may be deemed safe as to the widow, and most beneficial to all others, may be now made, as is usual in similar cases, directing the real estate to be sold, disregarding this devise to the widow, and leaving her to come in, according to the rule of the court, for a proportion of the proceeds of the sale in lieu of her dower at the common law, to which she and all concerned have thus tacitly admitted she may safely be remitted in place of the devise.—*Maccubbin v. Cromwell*, 2 H. & G. 444; *Margaret Hall's case*, 1 Blund, 203.

The claim of the complainant being established to the satisfaction of the Chancellor, except as against the defendants James Tilton and Clara Tilton, to the extent of whose interests it is barred by the act of limitations; and, it appearing that the personal estate of the said Jacob Gibson, deceased, is not sufficient for the payment of his debts. *Decreed*, that the bill of complaint be taken *pro confesso* against the absent defendants, &c. and against the defendants Nancy Gibson, &c. *Decreed*, that the real estate of the said Jacob Gibson, deceased, or so much thereof as may be necessary, be sold for the payment of the mortgage claim of the defendants, The Farmers' Bank, and the claim of the complainant as stated in the proceedings, and all other debts due from the said Jacob Gibson, deceased; that John Scott be appointed trustee to make the said sale, &c. (in the usual form.) And at the time of advertising said sale the trustee shall give notice to the creditors of the said Jacob Gibson, deceased, to file their claims with the proper vouchers in the Chancery office within four months from the day of sale. *Decreed*, in conformity with the decree of the Court of Appeals, that the answer of the defendant James Tilton; and, according to the principles of the same decree, the answer of the defendant Clara Tilton, be, and they are hereby declared to operate as protections to the interests of the said defendants in the real estate aforesaid, as against the complainant. And in taking the account of the claim of the complainant the auditor is directed to treat it as having been paid in proportion to the extent of the interests of the defendants James Tilton and Clara Tilton; to which extent they would have been required to contribute towards the payment thereof in respect of the interests acquired by them under the will of the said Jacob Gibson, deceased, if the aforesaid answers had not been filed. And the parties are hereby authorized to take testimony in relation to the said proportional deduction from the said plaintiff's claim, before any justice of the peace, on giving three days notice as usual; provided, that such testimony be taken and filed in the Chancery office within four months after the day of the said sale.

From this decree some of the defendants appealed, and the case having been brought before the Court of Appeals, the decree of the Chancellor was modified as set forth in 10 G. & J. 100.

Under this decree of the Court of Appeals the case having been returned to the Court of Chancery, the auditor on the 8th of May, 1840, reported, that he had examined the proceedings, and from them stated all the claims exhibited against the estate of Jacob Gibson, deceased; also an account marked A. between the personal estate of this deceased, and the executor thereof; and also an account marked B. between the real estate of this deceased and the trustee for the sale thereof; with sundry statements marked No. 1, 2, 3, 4 and 5; all herewith filed. That in account A. the amount of the personal estate, and the proceeds of the real estate as directed by the will to be applied to the payment of debts, according to the administration

to one of them; he who has it in his power to resort to the two funds may be compelled to obtain satisfaction, as far as he can,

account passed by the Orphans Court of Talbot county, is applied to the payment of the commissions and expenses and preference claims, as stated in said Orphans Court account; and the net balance proportionally distributed among all the paid and unpaid creditors of the deceased, who were not entitled to be preferred in the disposition thereof, whereby it appears, that these unpreferred creditors should have received as of the day of passing said Orphans Court accounts, \$9.61106 *per centum* of the amount of their claims. That in account B. the proceeds of the sale of the real estate are applied to the payment of the trustee's allowance for commission and expenses; and the costs of suit of the complainant and appellant in the first appeal, and of the appellees in the second appeal; for taxes due upon the estate sold; then to the satisfaction of the mortgage debt due to the defendant The Farmers' Bank, and the balance left unappropriated, because of its inconsiderable amount, and the many difficulties now attending a distribution thereof among the other creditors of the deceased.

The auditor further says, that claims No. 3, 4, 5 and 8, are not proved as the act of Assembly requires; that the original causes of action are wanting to support claims No. 3, 4 and 5; that all the devisees of the deceased plead the statute of limitations to claims No. 2 and 7; that James Tilton and Clara Tilton, and the heirs of Harriet Bennett plead this statute to claims No. 3 and 8; that Reynolds and wife plead this statute to claims No. 2, 3, 4, 5, 7, 8, 9 and 10. The auditor submits to which of these claims the statute applies; and that these claims, *viz*: No. 2, 3, 4, 5, 7, 8, 9 and 10, in the mean time be suspended. He further reports, that claim No. 10 appears to be a judgment recovered by the claimant of No. 7, against James Tilton, as the surety for the same debt as No. 7; and the auditor submits how far this judgment supports claim No. 7, as against any interest said Tilton may have in this estate. That the tax bills are not proved; nor have they been sanctioned by the trustee; it is, therefore, submitted, that they be suspended. He also reports, that many of the devisees, as well as the defendant, The Farmers' Bank, require, that the claims should be fully proved; and that claims No. 2, 3, 4, 5, 7, 8 and 9, are not fully proved.

The auditor further reports, that he has assigned so much of the balance of the proceeds of sale to the satisfaction of the mortgage debt of the defendant, the Farmers' Bank; because the whole sales were of the mortgaged premises. But, as the Court of Appeals, in their opinion delivered in this cause, at the December term, 1838, a copy of which is filed, say, that there may exist a state of things in which this mortgage claim may be reduced, certain statements are submitted in illustration of this point. That part of the opinion is as follows: 'If it should turn out, that the residue of that part of Marengo, devised to Fayette Gibson, and not by him conveyed to Edward Lloyd or John Blake, united with the other parts of Marengo, to which Fayette Gibson was entitled, after paying their just contribution towards the mortgage debt, and all other debts of the deceased, should prove inadequate to the payment of that portion of the mortgage which the part of Marengo devised to Fayette Gibson was bound to contribute; then with reference to the other devisees, owners of Marengo, the mortgage debt of the Bank must be deemed satisfied and paid to the extent of such inadequacy.' Statement No. 1, shews the value of Jacob Gibson's real estate at the time of his death. Statement No. 2, shews the value of the same, as of the time of taking the testimony in relation thereto. Statement No. 3 and 5, by which it appears, in these views of the proof, there will be such a deficiency as is intimated in the opinion of the Court of Appeals. And statement No.

out of that fund upon which the other creditors can have no claim, so as to leave the other fund for their satisfaction. The principle

4, by which, in another view of the proof, there will be no such deficiency. The proof, in relation to all these statements, is vague, and much of it derived from papers filed in this cause without a commission; moreover, it is applicable to different periods of time, much of it founded on estimates merely, and omits the valuation of some real estate of which, it would seem, the deceased died seised. These statements, 3 and 4, assume, that all the debts filed are to be paid; whereas to the most of them the statute of limitations has been pleaded by the devisees, and other parties, the Bank among the rest; and if it apply to them, then even the deficiency appearing on the statement No. 3 would be reduced to a small sum, if not entirely disappear.

The auditor further says, that in the event of the Chancellor's being of opinion, that these statements make it doubtful if the Bank can now receive the whole of its mortgage debt, it would seem, this doubt may be removed by the effect of the right of the Bank to claim by way of substitution, in the stead of the unpreferred creditors who have been paid off by the Orphans Court accounts, as is recognized by the opinion of the Court of Appeals. For, as the personal estate of Jacob Gibson, deceased, which would, if properly administered, have paid to all the unpreferred creditors thereof \$0.61106 in the dollar, as per account A. has been illegally administered, with the approbation of the devisees of the testator, whereby the creditors, the Bank among the rest, have lost this dividend, they are entitled to claim the same now, by way of substitution to the rights of these creditors so paid off; so that the Bank, for its claim No. 6, \$13,739 55, should be entitled to \$8,395 89, as against all the devisees; and according to statement No. 1, to upwards of \$3,000; and according to statement No. 2, about \$4,000, as against these proceeds of sale, either sum exceeding the deficiency estimated by statement No. 3 and 5.

It is therefore submitted, that, in this view of the case, the Bank has a claim against the mortgaged estate sold, by way of substitution to the rights of the creditors paid off out of the personal estate, to a much larger sum than can be the deficiency of its contribution by reason of the release to Lloyd; and, therefore, none of the parties to these proceedings are injured by the payment to the Bank of its entire claim out of these proceeds. Again, the Bank released Lloyd's part of Marengo, on condition that the proceeds thereof, as bought by Lloyd, should be applied to the payment of the debts of Jacob Gibson, deceased, which proceeds were accordingly, without objection by the parties, so applied, so that the release of the Bank, though its operation was to diminish the fund liable for the payment of the mortgage debt; yet, as the value of this released mortgaged estate was applied to the payment of the other debts due by the deceased, to the exoneration of the real estate of the other devisees of the testator therefrom, it would seem, these other devisees cannot now object to this release, unless they permit the Bank and Lloyd to claim, by way of substitution to the rights of the creditors so paid off by the terms of the release. This would increase the amount to which the Bank would be entitled, by way of substitution, and render it still more improbable, that any injury could result to these parties by paying off the whole of its mortgage debt.

The auditor further reports, that there is not now, in this cause, sufficient evidence from which he can accurately ascertain what should be the deduction from the plaintiff's claim, No. 1, by reason of the successful plea of the statute of limitations thereto by James Tilton and Clara Tilton; and he submits, that further proof be taken for that purpose. He also reports, that James Tilton was one of the sureties of Edward R. Gibson on his bond as executor of the deceased; and, in order to the

upon which this arrangement is made is not deduced from that which may properly be considered as the contract between debtor

indemnity of himself and his co-surety, Edward R. Gibson, conveyed by mortgage to them all his real estate devised to him by the deceased, prior to any of the conveyances thereof now among the papers. That claimants of No. 1, 3, 4, 5 and 7, have recovered judgments against this executor for their legal dividends of the assets of the deceased respectively, but have not received the same. That the personal estate of the deceased appears to have been long since fully paid off; the said Edward R. Gibson and James Tilton are both non-residents of this state. The auditor submits, therefore, if under these circumstances, the interest of said Tilton in this estate should not be held liable for the payment of the legal dividends of the personally on these judgments; and also, how far these creditors can avail themselves of this mortgage; and of their judgments to prevent the operation of the statute of limitations, as pleaded against them by the said Edward R. Gibson and James Tilton; those claiming under them, or of the mortgaged premises, as a security for the payment of their debts.

The auditor further reports, that the claimant No. 9, alleges, in his petition, among other matters, that he has a right to be reimbursed the amount of his said claim, as well out of the estate of the deceased, as out of any interest Edward R. Gibson or James Tilton may have therein, to all of whom he claims to stand in the relation of surety; that he claims to stand in the relation of co-surety to Fayette Gibson; and having paid, on account of the principal debtor, the amount of this claim, that he is entitled to be reimbursed one-half thereof out of any interest Fayette may have in the estate. He alleges, that Edward R. Gibson and James Tilton are non-residents, and that there is no other fund from which he can obtain payment. The auditor submits the effect of their several protections upon the respective interests of the parties.

And the auditor further reports, that since the preparation of these accounts and report, Francis G. Sheets and Clara his wife, formerly Clara Tilton, have filed their plea of the statute of limitations, and objected to all the claims; and that the heirs of Harriet Bennett and John W. Blake have filed the same plea and objection to all the claims, except that of the complainant.

On the 23d of December, 1836, the defendants Reynolds and wife, Edward R. Gibson, Fayette Gibson, the heirs of Harriet Bennett, the heirs of John W. Blake, and the devisee of Lloyd, relied on the act of limitations, laches, and lapse of time, against claim No. 7. On the 22d of July, 1836, the defendants Reynolds and wife, relied on the act of limitations against claim No. 2. On the 11th of February, 1837, the defendant Rebecca Gibson relied on the act of limitations against claims No. 2 and 7. On the 16th of May, 1839, the defendants Clara Tilton and the heirs of Harriet Bennett, relied on the act of limitations against claims No. 2, 7 and 8. On the 8th of February, 1840, the defendant The Farmers' Bank, relied on the act of limitations, laches, and lapse of time, against claims No. 2, 3, 4, 5, 7, 8, 9, and 10; and required, that the same should be fully proved. On the 25th of February, 1840, the defendants Sheets and wife, and the heirs of John W. Blake, and of Harriet Bennett, relied on the act of limitations against claims No. 2, 3, 4, 5, 6, 7, 8, 9 and 10; and Sheets and wife, at the same time, relied on the act of limitations against claim No. 1. On the 16th of September, 1840, the defendants James Tilton and wife, relied on the act of limitations against claims No. 2, 3, 4, 5, 6, 7, 8, 9 and 10. On the 19th of October, 1840, Lloyd's devisee relied on the act of limitations against claims No. 2, 3, 4, 5, 6, 7, 8, 9 and 10; and also required full proof thereof.

On the 3d of November, 1840, the defendant the Bank, excepted to the claims of

and creditor, but is founded on a natural and moral equity, that it shall not depend upon the will or caprice of one creditor who has

Lloyd and Blake, grounded on their alleged payment of debts due by the deceased, as having no just foundation; and as being barred by the act of limitations. And on the same day the plaintiff excepted, in like manner, and also relied on the act of limitations against claims No. 2, 3, 4, 5, 7, 8, 9 and 10.

On the 11th of July, 1840, the heirs of Harriet Bennett and of John W. Blake, excepted to the report of the auditor; 1st. That the claims to which they have objected have not been rejected. 2d. That in the said report he has assumed two valuations of the real estate, neither of which is based on sufficient testimony. 3d. That he has assumed as the basis of valuation the estimate made many years ago; whereas, it ought to be taken as of its present value. 4th. That having assumed as the basis of value an estimate made many years ago, he has reduced the estimate to make it correspond with the difference between the estimate of Marengo and the sum for which it actually sold; whereas, different causes may have operated to increase or diminish in equal or less degree the value of each piece of property; and the assumption is without proper evidence to sustain it. 5th. That he has not shewn what deduction ought to be made from the claim of the complainant in consequence of the plea of limitations, set up and allowed, of Clara Tilton and James Tilton. 6th. That he has not shewn what part of the claim of McCormick the plaintiff, as against the heirs of Gibson, rests upon the ground of substitution; and what part of the portion of the said claim to be paid by these defendants they ought to be relieved from, under the opinion of the Court of Appeals, in consequence of a failure of proof as to the claims paid out of the personal estate, in whose place a substitution on the part of McCormick is sought to be established. 7th. That the said report is not complete and full, and does not shew the liabilities of any portion of the estate, as it ought, of all and every part before justice can be done to the heirs, the complainant, the Bank, or other creditors. 8th. That the whole purchase money of the property sold, after deducting costs, and the trustee's expenses, are applied to the Bank mortgage debt, whereas it may happen, that the part sold is not sufficient for the payment of the mortgage, and that portion of the general debts which may be thrown upon it; and that such an appropriation ought not to be made, because of the right to substitution, as stated by the auditor; for the reason that these defendants object to the claim of the Bank, and plead limitations thereto, whenever made on the ground of substitution, or otherwise than under the mortgage upon the mortgage property. 9th. That there is no proof of the validity of the debts mentioned in account A. and the auditor erred in assuming them to reach such an amount as to reduce the personal estate to \$0.61106 in the dollar; or any other part of a dollar, less than the whole. 10th. That statements 3, 4 and 5, are erroneous, because the whole of Marengo ought to be estimated, and its value ascertained, and the excess of value over and above the payment of the mortgage, ought to be applied to the payment of the general debts like the rest of the property of the deceased; and not otherwise, so far as these defendants are concerned.

On the same day the heirs of John W. Blake excepted to the auditor's report, because no account has been returned allowing in their favour, and as a deduction from that portion of the debts which the property sold to their father ought to pay \$5,000, relied upon by the answer of the said Blake, as being a part of the purchase money paid to this Bank, in liquidation of a just debt due by the estate.

On the petition of the heirs of Harriet Bennett the parties were authorized to take testimony before any justice of the peace in relation to the facts presented by the auditor's report. And some time after the case was again brought before the court.

within his reach a double fund to disappoint another creditor of his satisfaction. And this principle has been applied in all such cases,

7th December, 1840.—BLAND, Chancellor.—This case standing ready for hearing on the auditor's report, filed on the 8th of May last, and having been submitted on notes by the solicitors of the parties, the proceedings were read and considered.

It must be recollected, that, according to the decree of the Court of Appeals, no sale is to be made of that part of the real estate to which the defendant Clara Tilton is entitled, and that the rights of the defendants James Tilton and Rebecca Gibson, are to be expressly reserved. The effect of which being to close the suit as to them, and to prevent any funds of theirs from being brought into court, there can be no claim made by any one, either as creditor or surety, against the interests of all or of any one of them; nor can they, or either of them, whose interests in the subject in controversy have been so finally and conclusively protected, have any standing here to plead the statute of limitations against any one else. Subject to the rights, thus declared, of these three defendants, the claims of the plaintiff McCormick, and the defendant the Bank, having been finally established, by the decree of the Court of Appeals, they cannot be affected by any plea of limitations which may have been since directed against them by any other creditor or party. The mortgage debt due to the Bank must be first satisfied out of the proceeds of the sale of the mortgaged estate, leaving the surplus, if any, to be charged as a portion of the property of the devisee to whom that estate had been devised; but, if the proceeds of the sale of the mortgaged estate should not be sufficient to pay the mortgage debt, then the Bank must be let in among the general creditors for such balance;—2 *Mad. Chan. Pra.* 655; *Greenwood v. Taylor*, 4 *Cond. Chan. Rep.* 381; *Hammond v. Hammond*, 2 *Bland*, 384; and, for the protection of that balance, be allowed to have the benefit of its plea of limitations against any other of the general creditors of the deceased.

In making the distribution of the proceeds of the sale of the real estate to the satisfaction of the creditors of the deceased, it is indispensably necessary to have a correct statement made of the amount of the claim of each creditor; and also to shew the fund upon which alone those claims are chargeable. Rebecca Gibson's interest in the estate of the deceased being in the nature, and in lieu of dower; and, as such, expressly reserved, must, therefore be first ascertained, and set apart as forming no portion of that fund upon which any creditor of the deceased can have any claim whatever. And the interests, other than the mortgaged estate liable for the mortgage debt, of Clara Tilton and James Tilton, having been placed, by the decree of the Court of Appeals, beyond the reach of this court in this suit, cannot be deemed a part of that fund out of which any creditor, now here, can have awarded to him payment of any portion of his claim.

A claim for contribution, either at law or in equity, can only arise as between or among co-sureties on the failure or insolvency of their principal; or where two or more being liable, in respect of, and in due proportion to the assets or effects respectively held by them, and one has paid the whole, or more than his due proportion of the debt. A claim for contribution being a secondary one, arising among co-debtors or those chargeable as such, can never be made or adjusted to the prejudice of a creditor in any way whatever. And therefore, as there has not been, as yet, any case of contribution brought before the court, no further notice need be taken of the principles of law or equity, in relation to such a case; and especially as it can only be made after all the claims of the creditors of the deceased have been definitively adjusted.—*Harbert's case*, 3 *Co.* 12; *Long v. Short*, 1 *P. Will.* 103; *Harris v. Ingledew*, 3 *P. Will.* 98; *Lingard v. Bromley*, 1 *Ves. & B.* 116; *Dering v. Winchelsea*, 1 *Cox*, 318; *Headley v. Readhead*, *Coop.* 50; *Mayhew v. Crickett*, 2 *Swan.* 192; *Cheesebrough v. Millard*, 1 *John. Ch. Ca.* 415; 1 *Mad. Cha. Pra.* 233.

as well under the peculiar circumstances, in the life-time as after the death of the debtor. (o) A mere bounty of the testator enables the

But, in respect to the claim of the plaintiff McCormick, founded as regards the whole real estate of the deceased debtor, on a promissory note for \$2,500; and, as such, being an apparently indivisible cause of suit, it has been finally determined, that the pleas of limitations which had been successfully directed against it, by the defendants James Tilton and Clara Tilton, enured only to their own benefit, and operated no farther than as a protection of their interests, by shewing that the plaintiff's claim had been satisfied as to them. Hence it now becomes necessary to ascertain to what that proportional satisfaction amounts. These protective pleas operate as a bar of so much of the plaintiff's claim existing at the time of the death of the deceased; and which, after deducting from it any payment obtained, or to which it was entitled from the personal estate, might otherwise have been charged upon the realty in the hands of these two defendants.—*Huslewood v. Pope*, 3 P. Will. 325. And, therefore, their protective pleas operate as a bar of all costs, &c., incurred in this suit; and as presumptive evidence of the payment, in some way, of such a proportion of the whole debt so chargeable upon the whole of the deceased's real estate, exclusive of the mortgaged estate, actually applied to the satisfaction of the mortgage debt, as the value of their interest therein bears to the value of the whole real estate of the deceased at the time of his death, when their interests vested; and to which time their protective pleas relate.—*Long v. Short*, 1 P. Will. 403, note; *Craig v. Baker*, 2 Bland, 238, note.—James Tilton's life interest to have a value set upon it as of that date by the Chancellor, as usual, on proof of his then age, health, &c. This proportional deduction, unlike a claim for contribution, is an immediate and preliminary right according to which the claim of the creditor must be cut down before any others, who may be liable, can be called upon to pay the sum thus ascertained to be due.

In regard to all creditors, other than those herein before spoken of, it must also be recollected, that the statute of limitations, in general, enures only to the benefit of him who pleads it; that no creditor, who has a prior right of satisfaction, or has failed to sustain his claim, or whose claim has been, in any way, wholly barred; and who, consequently, has no interest to benefit or protect by a plea of limitations, can have any standing in this court to direct such a plea against, or to the prejudice of any one else.—*Lingan v. Henderson*, 1 Bland, 276.—That as the personal estate is primarily liable, a well sustained plea of the statute of limitations, by an executor or administrator, against the claim of any creditor must necessarily enure to the benefit of the heirs; and, so too, a complete bar of any kind as against the personalty must, to the same extent, be allowed to operate as a bar for the protection of the realty.—*Tessier v. Wyse*, ante 23; S. C. 4 G. and J. 296.—But although the executor or administrator may not have pleaded the statute of limitations; or may have failed to establish such a plea when relied on, nevertheless such a plea may be made available by the heirs to cover the realty, a judgment even, against an executor or administrator, being no authentication whatever against the heirs.—*Duwall v. Green*, 4 H. & J. 270; *Pulnam v. Bates*, 3 Cond. Cha. Rep. 355; *Dorsey v. Hammond*, 1 Bland, 470.—That as a plea of the statute of limitations by one of several heirs enures to his benefit only, such a sustained plea by an heir operates as a bar of only such a proportion of the creditor's claim as the whole of it bears to that of such heir's interest in the whole real estate; that of the several pleas of limitations, relied on by

(o) *Lacam v. Mertins*, 1 Ves. 312; *Aguilar v. Aguilar*, 5 Mad. 414.

legatee to call for this species of marshalling; that if those creditors, having a right to go to the real estate descended, will go to

the several creditors, that which has been first pleaded and filed must be first applied and have an operation to the exclusion of any subsequent plea of limitations against the claim of him who so first pleads; but where pleas of the statute of limitations have been filed by different creditors on the same day, so as to have a countervailing operation against each other, all such pleas must be rejected so far as they so operate; that no plea of the statute of limitations can be of any avail against a claim stated in the bill and expressly or tacitly allowed by the decree, unless upon the ground of some specified fraud.—*Strike's case*, 1 *Bland*, 68; *Williamson v. Wilson*, 1 *Bland*, 441; *Welch v. Stewart*, 2 *Bland*, 38; *Hammond v. Hammond*, 2 *Bland*, 359. That no plea of the statute of limitations can be allowed against any claim not then filed or put upon the record; that a plea of the statute of limitations against a claim may be put in at any time after its voucher has been filed; provided he who so pleads has not done any act which necessarily implies a waiver of a reliance on such plea.—*Welch v. Stewart*, 2 *Bland*, 41.—That all directions by a party or creditor to the auditor, or exceptions to his report which, in substance, rely upon the statute of limitations as a bar to any claim then filed, other than those of the plaintiffs, are to be considered as sufficiently formal pleas to that effect, subject to the before mentioned rules.—*Strike's case*, 1 *Bland*, 93; *Norwood v. Norwood*, 2 *Bland*, 481, *note*. And that the statute of limitations runs up to the time of filing the voucher of the creditor's claim.—*Welch v. Stewart*, 2 *Bland*, 41.—But if it does not appear, or is not shewn when the voucher was filed, it cannot be taken to have been filed before the day on which it appears to have been first stated by the auditor, or the day of filing the plea in which it is first noticed.

In order to give full effect to the right of substitution to which any creditors, so far as they may not have a right of preference in virtue of any lien, may be entitled, the proceeds of the sale of the real estate must be so distributed as not to award any thing to a creditor who has received any payment from the personal estate until all the other creditors have received an equal proportion of satisfaction from the realty.—*Hammond v. Hammond*, 2 *Bland*, 384; *Wilson v. Paul*, 11 *Cond. Cha. Rep.* 320; *Mitchelson v. Piper*, 11 *Cond. Cha. Rep.* 321.—For which purpose a statement must be made shewing how the personal estate of the deceased has been disbursed among his creditors; and the amount of the debts paid by those who the Court of Appeals have declared have a right to be substituted in the place of such creditors of the deceased. Nothing, however, can be returned to any one of these defendants as devisees of the deceased, as the surplus of the proceeds of the sale of the real estate devised to him, until he has made good, from such surplus, all that for which he may be in any way liable to the estate of the deceased, or to any one or more of the other devisees.

All these directions must be controlled by, taken and construed in conformity to the opinions, directions and decrees of the Court of Appeals. And the said report of the auditor, and the exceptions thereto, so far as the same may be at variance with these directions, are hereby overruled.

Whereupon it is *Ordered*, that this case be and the same is hereby referred to the auditor, with directions to state an account or accounts accordingly, from the pleadings and proofs now in the case, and from such other proofs as may be laid before him; from which he will exclude all claims not then sufficiently authenticated; and also all others not then fully proved, where full proof has been required by any one competent to plead the statute of limitations, and also to require full proof for the protection of his own interests.—*Dorsey v. Hammond*, 1 *Bland*, 471.—And the par-

the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not. So that wherever there

ties are hereby authorized to take testimony in relation to the said account before any justice of the peace, on giving three days notice as usual: *Provided*, that the said testimony be taken and filed in the Chancery office in this case, on or before the twentieth day of February next.

The time allowed by this order for the taking and returning of testimony was extended to the sixth of March following; under which some further proofs were taken and returned accordingly.

After which the auditor by his report dated on the 8th and filed on the 9th of March, 1841, says, that in obedience to the order of the 7th of December, 1840, he had examined the proceedings in this cause and arrived at the following conclusions:

The amount of proceeds of sales made by the trustee on the 27th of March, 1839, appears, from the auditor's report filed on the 8th of May, 1840, to have been \$15,637 36; from which deduct the commissions and expenses of the trustee as shewn by the same report \$728 47; and costs of suit in this court and the Court of Appeals, \$879 17; and additional costs now due \$110 57; and there remains the net sum of \$13,919 15, to be appropriated according to the principles heretofore established in this cause. The mortgage debt of The Farmers' Bank of Maryland, with interest to the day of sale, as per the same report, and covering all the property sold amounts to the sum of \$13,739 55. And, if the net proceeds of sale are to be applied to its payment, there would remain for distribution amongst the general creditors only the sum of \$179 60.

The auditor finds, that all the claims filed against the estate; except that of the complainant, are barred by the statute of limitations, which has been pleaded by all the parties whose interests would be affected by them.

The mortgage of the Farmers' Bank covers the whole of that part of the estate of the deceased, known as Marengo, which was devised to Fayette Gibson, to Edward Gibson, and to Frances Gibson, now Frances Tilton, wife of James Tilton. Before the institution of these proceedings, Fayette Gibson had sold his portion thereof to Edward Lloyd, one of the defendants, with the consent of the Bank; and it had been held not to be answerable for any part of the mortgage debt. The Court of Appeals have further said, in reference to the position in which the Bank has been placed by their consent to the proceedings of Fayette Gibson, that if it should turn out, that the residue of that part of Marengo, devised to Fayette Gibson, and by him conveyed to Edward Lloyd or John W. Blake, united with the other parts of Marengo, to which Fayette Gibson was entitled, after paying their just contribution towards the mortgage debt, and all other debts of the deceased, should prove inadequate to the payment of that portion of the mortgage, which the part of Marengo devised to Fayette Gibson was bound to contribute, then in reference to the other devisees, owners of Marengo, the mortgage debt of the Bank must be deemed satisfied and paid to the extent of such inadequacy. Hence it becomes necessary before determining how much of the fund in hand ought to be applied to the payment of the mortgage debt of the Bank, to ascertain what part of it, the land sold to Lloyd would have been made to contribute if now liable. And as Edward Gibson's devise, which is the part of Marengo alluded to in the opinion of the Court of Appeals, as the part to which Fayette Gibson is now entitled, is answerable for its proper proportion of the general debts, its liability, in this respect also, must be established before making a distribution of the proceeds of sale.

But no part of the estate of the deceased has been sold; except those parts of

is a double fund, though this court will not restrain a party, yet he shall not so operate his payment as to disappoint another claim, whether arising by the law, or by the act of the testator. (*p*)

Marengo which were devised to Edward Gibson and Frances Gibson, now Mrs. Tilton; and the only mode of ascertaining the liability of any one share of the estate is to make an apportionment of the outstanding claims against all the devisees who will be eventually answerable therefor, according to the most accurate valuation that can be obtained. For the purpose of affixing a proper valuation upon the several pieces of property devised by the deceased, the auditor has relied on the testimony taken under an order of court of the 14th of September last; and as he is required, for the purpose of giving proper effect to the plea of limitations set up by James Tilton, for his life interest, and Clara Tilton, for her part of the estate as allowed by the court, to make the estimate as of the day of the death of the deceased, he has considered the true intent and meaning of the order of the 7th of December, 1810, to be, that all the property must be valued as of that day, and endeavoured accordingly, so to estimate it. There are three parcels of property, mentioned in the will of the deceased, not embraced by the testimony, viz: a house and lot in Easton, certain land in Alleghany county, and certain land in Tuckahoe. These parcels have therefore been omitted by the auditor in all his calculations; but, if they should be hereafter found by the trustee, they might be sold, and the proceeds distributed amongst the several parties according to their respective rights and interests as they may, by that time, be established. The rest of the estate of the deceased is valued as of the time of his death in the following manner, viz:

First, Edward Gibson's part of Marengo at \$17,062 50; *Second*, Frances Tilton's part of the same at \$6,189 59; *Third*, Fayette Gibson's part of the same at \$7,075 00; *Fourth*, Clara Tilton's devise at \$5,681 00; *Fifth*, Anne Reynolds, wife of Joseph Reynolds, devise at \$9,315 00; *Sixth*, Fayette Gibson's devise sold to John W. Blake at \$10,500 00; *Seventh*, Harriet Bennett's devise at \$7,840 00. The whole estate valued at \$63,663 09.

According to the above estimate the mortgaged property ought to have paid, at the death of the deceased, the mortgage debt in the following proportions, viz: The whole mortgage debt with interest to the day of sale amounts, as per auditor's report filed the 8th of May, 1840, to \$13,739 55. *First*, Edward Gibson's part of Marengo would have paid for its proportion \$7,730 09; *Second*, Mrs. Tilton's part would have paid \$2,804 17; and *Third*, Fayette Gibson's part, sold to Lloyd, \$3,205 29.

In order to arrive at the proper value of the equity of redemption in these parcels of land the auditor has estimated the interest of Mrs. Rebecca Gibson, the widow of the deceased, and charged it upon that part of Marengo which was devised to Fayette Gibson, it being proved, that for the first few years after the death of her husband, she resided on that place. He finds from the testimony, that her interest is valued at one hundred and fifty dollars *per annum*; and from the proof, taken on the sixth day of March, 1841, that at the death of the deceased she was forty-nine years of age; which, according to the rule of this court, would entitle her to nine hundred and thirty-seven dollars and fifty cents. This sum has accordingly been deducted from the equity of redemption of that part before apportioning the general debts, as an incumbrance not subject to any of them.

The equity of redemption on Marengo, after satisfying the mortgage debt, and subject to Mrs. Rebecca Gibson's interest under the will of the deceased, will be as

But in making this arrangement great care must be taken not to lessen or impair, in any manner whatever, the obligation of the

follows, viz : *First*, Edward Gibson's part valued at \$17,062 50; deduct portion of mortgage debt \$7,730 09, leaving \$9,332 41; *Second*, Fayette Gibson's part sold to Lloyd, valued at \$7,075 00; deduct portion of mortgage debt \$3,205 29; and Mrs. Gibson's dower \$937 50, leaving \$2,932 21; *Third*, Mrs. Tilton's part valued at \$6,189 59; deduct portion of mortgage debt \$2,804 17, leaving \$3,385 42.

In order to assess upon Edward and Fayette Gibson's devise of Marengo a proper proportion of the complainant's claim, it will now be necessary to apportion that claim amongst the several devisees, assuming, that the mortgaged property is to contribute according to the value of the equity of redemption only as just settled. The complainant's claim is a note dated 18th October, 1817, payable five months after date, due 21st March, 1818, \$2,500 00, deduct dividend of personal estate, \$1,994 93; we find his claim as of this date to be \$505 07; of which Edward Gibson's devise ought to have paid \$96 22; Fayette Gibson's devise, sold to Lloyd, \$30 23; Mrs. Tilton's, \$34 91; Mrs. Reynold's, \$96 04; Mrs. Bennett's, \$80 83; Fayette Gibson's, sold to John W. Blake, \$108 27; and Clara Tilton's, \$58 58. A proper reduction of the complainant's claim may now be made on account of the plea of limitations put in by James Tilton and Clara Tilton. The whole claim of complainant properly chargeable on the real estate as above \$505 07; deduct Clara Tilton's portion thereof \$58 58; and six-fifteenths for James Tilton's life interest, \$15 96; leaves \$432 53, due to the complainant.

As the Court of Appeals have said, that the complainant is entitled to substitution in the place of creditors who, to his exclusion, were paid out of the personal estate; except against Bennett's and Blake's heirs, it may be seen by the following statement what is the amount as against the latter, as well as all the rest of the devisees.

His claim properly chargeable against the real estate on the 21st of March, deducting loss by the plea of limitations, as above, \$432 53. Interest from the 21st March, 1818, to the 27th of March, 1839, \$545 42; shewing as the basis of apportionment the sum of \$977 95, against Bennett's and Blake's heirs. The sum to be apportioned as against the rest will be found by adding dividend of personal estate, \$1,994 93, with interest thereon from 21st March, 1818, to the 18th December following, \$88 77; amounting to \$2,083 70. Then paid by the executors, \$600 00; leaving a balance of \$1,483 70; interest on which from the 18th December, 1818, to the 27th March, 1839, \$1,804 92, amounting to \$3,288 62, which, added to the sum shewn as the basis of apportionment, amounts to \$4,266 57. But the complainant's claim as now recoverable amounts to the sum of \$3,446 75; of which Edward Gibson's devise would pay \$1,266 06; Fayette Gibson's, sold to Lloyd, \$397 79; Mrs. Tilton's, deducting six-fifteenths for James Tilton's life interest, \$275 42; Mrs. Reynolds', \$1,263 70; and Bennett's heirs, \$243 78. If we add to this amount the loss by not allowing the complainant the benefit of substitution against Bennett's heirs, his whole claim as shewn; viz: as above, \$3,446 75; loss, \$819 82, the whole claim will be as above, \$4,266 57.

In the above apportionment the auditor has not included the devise to Fayette Gibson which was sold to John W. Blake, because it appears from the testimony, that after the sale of that portion to him, he paid debts of the estate to the amount of \$5,555 56; which is larger than the whole of the complainant's claim, even without allowing interest on the payment to the day of sale, to bring the payment to an equality with it.

Having now ascertained what portion of the general debts are properly chargeable upon Fayette Gibson's portion of Marengo, sold to Lloyd, as well as upon

creditor's contract. It can only be made where all the parties are before the court, and the whole subject is within its juris-

Edward Gibson's portion, now owned by Fayette Gibson, it will be seen, that the contingency has happened which was contemplated and provided for by the Court of Appeals. Edward Gibson's part of Marengo sold for \$10,500 00; to pay its portion of costs, \$291 25; commissions, \$531 55; mortgage debt, \$7,730 09; McCormick's claim, \$1,266 06; to pay Lloyd's portion of the mortgage debt, \$3,205 29; of costs, \$120 77; and of McCormick's claim, \$397 79; amounting altogether to \$13,045 80. Loss to the Bank of \$3,045 80.

But the auditor finds from the testimony, that Lloyd, after his purchase, paid a large sum for debts due by the estate, amounting to the sum of \$3,161 53, with interest from the 6th February, 1822, to the 27th March, 1839, \$3,235 83; making \$6,397 36—which is greater than the sums assessed upon his portion of the devise and Edward Gibson's. The auditor has, in apportioning the complainant's debts amongst the devisees, included Lloyd, although he appears to have paid more than his proper proportion; because that is no defence against a creditor. The creditor, it is conceived, has also a right to require this assessment to be made as against the Bank, because there does not appear to be any reason for allowing the Bank, by its agreement with the owners of any part of the mortgaged property to alter the situation, or change the rights of any other creditor. In respect to the complainant's claim, therefore, the property has been charged as if the agreement for the sale of Lloyd's portion had not been assented to by them. Although the auditor has excluded Blake's heirs, and Lloyd, from contribution towards the payment of the complainant's claim, the former being already excluded, and the Bank being substituted in the place of the latter, as will be seen hereafter, they have been charged with their proper proportion of costs, inasmuch as the decree went against them in common with the other devisees; and a payment of one creditor is no just defence against the claim of another; unless the assets have been consumed. But in giving the Bank the substitution above mentioned, the other devisees pay only to the extent of the benefit they have received from the payment made by the Bank, so as to leave the Bank to stand in the same situation in which the complainant would have stood, if he were seeking from them the payment of his claim. If then, the Bank seeks from the other devisees payment of the portions of that debt paid by Edward Gibson's interest, the following will be the result: Loss to the Bank as above, \$3,045 50; of which Mrs. Tilton would repay \$176 07; Mrs. Reynolds, \$807 89; Bennett's heirs, \$155 86; and Lloyd's heirs for proportion of costs, \$120 77; amounting to \$1,260 50; leaving an eventual loss of \$1,785 21.

The auditor now proceeds to distribute the funds in the hands of the trustee amongst the several parties according to the views heretofore presented in his report; and in doing so will assess upon the property sold, all the commissions and expenses of the sale; and the other costs upon all the property; except Mrs. Tilton's interest and the devise to Clara Tilton. He will then assign all of Mrs. Tilton's interest that may remain, after discharging its appropriate liabilities, to the complainant, in payment of so much of his claim, leaving to her a remedy against the other devisees. He will then proceed to shew in what proportions the devisees ought to pay the balance of the complainant's debt, and repay Mrs. Tilton. In apportioning the debt of the complainant amongst the devisees, the only motive of the auditor is to shew by what payments the other devisees may avoid a sale; and, if any one should pay the whole, what his equity against the others would be.

Credit for the whole amount of sales as per auditor's report, filed on the 8th of May, 1840, \$15,637 36. Against which debit: Commissions and expenses of trus-

diction; and where it is clear, that the creditor can sustain no loss, nor be in any way delayed, or have his claim subjected to

tee, \$728 47; costs in this court and the Court of Appeals, \$879 17; additional costs; register's fees, \$23 07; tax, 50 cents; depositions, \$45 00; and auditor's fees, \$42 00; making \$110 57; amounting altogether for commissions, costs and expenses, to \$1,718 21. To the Farmers' Bank for their mortgage debt, \$13,739 55; deduct losses above, \$3,045 55; then add, to be repaid by Mrs. Tilton, \$176 07; leaving due to the Bank the sum of \$10,869 82. To James Tilton, for his life estate in Mrs. Tilton's equity as sold, three-twelfths, \$584 30. To the complainant for his proper proportion of Mrs. Tilton's equity, \$275 42. To ditto, for his proper proportion of Edward Gibson's devise, \$1,266 06. To ditto, for proper proportion of Fayette Gibson's devise, sold to Lloyd, \$397 79, and to ditto, for balance of Mrs. Tilton's equity, \$525 76. Being equivalent to the before mentioned whole amount of sales, \$15,637 36.

By the foregoing account the complainant would receive out of the funds in hand on his claim, the sum of \$2,465 03; his whole claim as recoverable amounts to \$3,446 75; leaving still to be provided for, the sum of \$981 72; of which Mrs. Reynold's devise ought to pay \$822 96; and Mrs. Bennett's, \$158 76.

Mrs. Tilton's devise sold for \$5,137 36; deduct proportion of mortgage debt, \$2,804 17; proportion of costs, commissions, &c. \$299 57; leaving a balance due her of \$1,173 90. Of which she repaid to the Bank, \$176 07; leaving to be repaid to her by Reynolds and wife, \$440 74; and for costs, \$159 01; making \$599 75; by Bennett's heirs, \$35 02; and for costs, \$133 83, making \$218 85; and by Blake's heirs for costs, \$179 23.

The following will shew the situation of the estate after the distribution of the proceeds according to the former account. *Debtor*—The estate to the Bank, \$1,260 59—to complainant, \$981 72—to Mrs. Tilton, \$997 83; making \$3,240 14. *Credit*—Due by Reynolds and wife, \$2,230 60; by Bennett's heirs, \$533 47; by Lloyd for costs, \$120 77; by Blake's heirs for costs, \$179 23; paid by Mrs. Tilton to the Bank, \$176 07; amounting as above to \$3,240 14.

If these views be correct the Bank would lose the sum of \$1,785 21; but as there would have been no loss if the mortgaged property had been properly applied, the Bank can come upon the estate only as a general creditor for this balance; either in its own right, or by substitution; and it is conceived, that for the amount which is claimed as a general creditor, the plea of limitations, as set up by the devisees, would be sustained; and that the above mentioned balance would be finally lost.

In order, however, to meet the views of the Bank, in case the plea of limitations should not be sustained, the auditor has prepared the following statements to shew what would be the amount of contribution due from each of the devisees liable therefor, if the claim be sustained. This will be done in reference to the plea of limitations set up by Clara and James Tilton, and the right of Mrs. Bennett to have the personal estate first applied; and the distribution would be made as it was for the complainant's claim as follows: claim of the Bank as a general creditor \$1,785 21; Mrs. Tilton would pay \$180 28; Mrs. Bennett \$113 61; and Reynolds \$826 80; making \$1,120 61; being a loss on Bennett's portion of \$582 28; on Clara Tilton's of \$82 32; shewing still a loss to the Bank of \$664 60.

The auditor has not allowed any of the claims for taxes; because it does not appear that there was an insufficiency of personal property on the premises, or in the county; without which proof, they cannot be regarded as a lien on the realty. And if such proof were produced, it would still be necessary to shew upon what pieces of property they accrued, in order to charge the proper parties with them.

any additional peril. For if the parties have not been all brought before the court; or if they cannot be brought before it; because of their not having any such privity of interest as will warrant the making of them parties to the same suit; or if the two funds cannot be embraced within the scope of the same suit; and much more so, if they be not both of them within the jurisdiction of the court, it would be utterly impracticable to make any such arrangement in favour of any one set of creditors against another, the security of whose claim may be thus greatly endangered, and the satisfaction of which must necessarily be delayed and consequently lessened. (7)

It is believed, that although the real estate of a deceased debtor may be subjected to the payment of his debts in most of the states

He further reports, that he designs hereafter to file with this report accounts, drawn off in form, containing what is already included in this report; for the purpose of more convenient reference, so as to enable all the parties interested to see, without reading the report, the result at which it arrives.

Soon after which the auditor reported, that in conformity with his suggestion in his report of the 8th instant, he has prepared and now submits herewith accounts A. B. C. and D. Accounts A. and B. present the views of the auditor as stated in his said report. Account C. shews the liabilities of the several parties to each other, if the Bank is allowed to claim by substitution, or as a general creditor for the amount lost on Edward Gibson's devise. Account D. has been prepared under the instruction of the solicitor of the Bank; and awards to that institution payment of its debt in full; leaving a small balance unappropriated.

On the 23d of April, 1841, the plaintiff, the heirs of Bennett, and of Blake, and Mrs. Tilton and James Tilton, excepted to this report of the auditor; and on the day following the Bank filed their exceptions to it. Soon after which the case was submitted without argument.

29th April, 1841.—BLAND, *Chancellor*.—*Ordered*, that the foregoing accounts, designated as accounts A. and B. as made and reported by the auditor, be and the same are hereby ratified and confirmed; and the trustee is directed to apply the proceeds accordingly, with a due proportion of interest, that has been or may be received. All other parts of the said reports of the auditor filed on the 9th of March last, together with all exceptions to the same, which are in any way at variance with this order, are hereby overruled and rejected.

It is understood that the parties acquiesced in the propriety of this order, and finally adjusted the case among themselves accordingly.

This case has been inserted here as a leading one in relation to the statute of limitations when relied on in a creditor's suit; and the nature and operation of its principles may be deemed to have been sufficiently illustrated by what is here said, together with what has been stated of it in the other reports of it referred to as above.

(7) *Wright v. Simpson*, 6 Ves. 734; *Ex parte Kendall*, 17 Ves. 520; *Everston v. Booth*, 19 John. Rep. 486; *The York & Jersey Steam Boat Ferry Company v. The Associates of the Jersey Company*, 1 Hopkins, 460.

of this Union; yet in each one, the mode of administering such assets is materially different. The general creditors have, in some states, greater difficulties to encounter than in others; the right of preference and the classification of creditors varies; and in some the real assets are within reach of all, while in other states creditors of only a particular description are allowed to resort to them. In this case the plaintiffs themselves say, by their exceptions, that the land in the District of Columbia, which has been conveyed as an additional security for this claim, No. 4, 'is not liable for their claims and other general creditors.' Why it is not so liable, according to the law of the District of Columbia, it is unnecessary to enquire; it is enough for this court to know, that the other fund is a portion of territory, or immoveable property, subject to another government; and is governed by law which may fairly be presumed to be, in many respects, substantially different from that of this state, to demonstrate, that no such arrangement can be made which may not materially impair the obligation of the contract of that creditor against whom the funds of the debtor are directed to be marshalled; and which may not prejudice his interests, or greatly delay the satisfaction of his claim.

In the case of principal and surety there can be no doubt, that, on a bill filed by the surety, he will be allowed the benefit of all the securities of the principal, wherever they may be located, or by whatever law they may be governed; so far as this court has the power and the jurisdiction to assure to him the benefit of them. Thus, if the creditor has obtained a security, by mortgage of land in another state, or in a foreign country, the validity of which had been impaired or made questionable by the creditor himself; the surety may here have the creditor ordered to sue upon such foreign security for the purpose of testing its validity, and endeavouring to obtain satisfaction; because if the security has, in fact, by his own conduct been rendered so unavailable that he cannot recover, the surety will be discharged. And this arises as an equitable consequence of the nature of the contract by which the principal and surety are bound. (r)

The marshalling of different funds among creditors, is not, however, founded on any such equity or implied contract between debtors; but rests upon a natural and moral equity; that no one ought to be permitted, at his mere will, to derive a benefit from

(r) Theobald Prin. & Sur. 256; Hayes v. Ward, 4 John. C. C. 123.

that which must injure another; and that equality is equity, provided the court has any foundation for enforcing such equity without depriving a party of his clear legal rights, or impairing the obligation of his contract. (s)

I am therefore of opinion, that the claimant No. 4, cannot, for the benefit of the other creditors of the deceased, be required to proceed against and exhaust the fund, or land in the District of Columbia, which had been mortgaged to them as a security for their debt, before they are allowed to come here for satisfaction out of the proceeds of that fund lying within this state which had also been mortgaged to them as a security for the same debt.

It appears, that claim No. 11, the voucher of which was filed on the 30th of October, 1830, is founded on a supersedeas judgment, acknowledged by the deceased on the 17th of April, 1815, which, after having been suffered to lapse, was revived by *scire facias* in 1822. And, consequently, it is now a subsisting lien upon the real estate of the deceased, not barred by the statute of limitations, and, as such, is entitled to a preference over all subsequent liens, as well as over all the claims of the general creditors.

But the mortgage on which claim No. 4 is founded, bears date on the 10th of October, 1821, at a time when this judgment must have so expired, that no execution could have issued upon it; and, therefore, it could not, after that time, be revived so as to overreach the mortgage claim No. 4; and thus, upon the principles heretofore laid down by this court, (t) this judgment claim No. 11, can only be allowed a preference out of the proceeds of the realty, after the mortgage claim No. 4 has been fully satisfied.

The claims No. 35 and 36, founded on judgments rendered against the deceased on the 10th of April, 1818, being the eldest liens upon the realty of the deceased, appear to be entitled to a preference over all other claims. But *The Bank of the United States*, who stands here as claimants No. 4, 5, 6, 7 and 8, has relied upon the statute of limitations in opposition to these two claims; the vouchers of which were not filed until the 13th of January, 1832, and therefore they are clearly barred. And hence, according to the rule laid down, in relation to this matter, these claims, No. 35 and 36, can be allowed to obtain no portion of these assets to the prejudice of any of the claims of the *Bank* which may be in any manner, or to any extent sustained as against the estate of the

(s) 2 Fonb. Eq. 298.—(t) *Coombs v. Jordon*, ante 284.

deceased ; although as against all the other creditors, now before the court, except claim No. 4, they would, if not opposed by a plea of limitations, be clearly entitled to a preference ; even against claim No. 11, whose right to issue an execution upon his judgment, existing at the time when these two judgments were obtained, having been suffered to expire, could not be revived so as to overreach an intermediate lien or conveyance, which during its lapse, had taken full effect. (u)

The personal estate is the fund primarily liable for the payment of debts ; and therefore, if the real estate be mortgaged, the personal estate must be applied in discharge of the mortgage in relief of the realty. But where there are simple contract creditors who cannot resort to the mortgaged estate, the mortgage debt may be thrown entirely upon it, so as to leave the personalty for the benefit of the simple contract creditors. But by our law, on the personal estate being exhausted, all creditors may resort to the realty ; and therefore, in administering the assets of a deceased debtor, in this court, there can rarely be any necessity for such a marshalling of the funds for that purpose, since all the assets, real and personal, are to be applied to the satisfaction of the creditors according to the priorities of their respective liens ; and then in satisfaction of the rest in due proportion ; applying the personalty first, so that if there be any surplus it shall be left as of the realty, and go to the heirs.

If there was here no other distinction among these creditors, than that arising from the nature of the securities of their claims as derived from the deceased debtor himself, the distribution of these assets might be made among them upon principles the most simple and obvious. But, it must be recollected, that, according to the recently established rules, an absolute judgment against an executor or administrator, although conclusive as between the creditor and executor or administrator, is not so as between the creditor and the heir or devisee ; and that a plea of the statute of limitations, if established as a bar, can only enure to the benefit of him who pleads it ; and besides, that although a creditor who has obtained an absolute judgment at law against an executor or administrator, will not be permitted to levy his debt by a *fiери facias* after a decree to account ; yet he cannot, on coming in, under the decree, be compelled to part with any advantage his judgment has

(u) 1823, ch. 194 ; *Coombs v. Jordan*, ante 234.

given him as against the personal estate. (*w*) And, consequently, it will not only be necessary here to place the mortgage debt, claim No. 4, and the judgment debts, claims No. 11, 35 and 36, altogether upon the estate bound by those liens, in order to let in the general creditors, whose claims are not barred by the act of limitations as against the personalty, to obtain what they can from that fund; but also, for the purpose of having the absolute judgments, which as regards each other, stand upon an equal footing, first satisfied out of that fund, so that the heirs, who must be allowed to be substituted for them, may obtain reimbursement from the administrator himself, to the amount of their inheritance taken to satisfy the balance of those judgments. For the amount of which balance there must be a decree over in favour of those judgment creditors; or after all the creditors have been fully satisfied in favour of the heirs, who, for so much, have a right to be substituted for those creditors against the administrator against whom those absolute judgments have been rendered. (*x*)

I shall therefore direct, that the proceeds of the sale of the real estate be applied first in full satisfaction of the mortgage and judgment debts, claims No. 4, 11, 35 and 36, according to their respective priorities and rights as against others; that the personal estate be first applied in full satisfaction of the absolute judgments rendered against the administrator; and then, that the residue of the personalty, if any, be applied in satisfaction of those claims which, as against it, have not been barred by the statute of limitations.

The claims of these plaintiffs, designated in the auditor's report as claims No. 1, 2 and 3, have been established by the decree of the 4th of May, 1830; and, therefore, cannot now be impeached by any creditor coming in under that decree; unless upon the ground of mistake, fraud, or collusion with the defendants. (*y*) No objection of that kind has, however, been made or alluded to; and, therefore, the exceptions against them must be overruled. But then although these plaintiffs had, previously to the institution of this suit, obtained absolute judgments at law against the administrator of the deceased; yet having alleged in their bill, that there was not a sufficiency of personal estate to satisfy their claims; and

(*w*) *Martin v. Martin*, 1 Ves. 212; *Lowthian v. Hasel*, 4 Bro. C. C. 171; *Hammond v. Hammond*, 2 Bland, 361.—(*x*) *Walker v. Preswick*, 2 Ves. 622; *Ellicott v. Welch*, 2 Bland, 217.—(*y*) *Harrison v. Rumsey*, 2 Ves. 488; *Welch v. Stewart*, 2 Bland, 38.

having obtained a decree for a sale of the realty founded on an admission of the truth of that allegation, they cannot now have a decree over, against the administrator, for any balance of their claims, that may remain unsatisfied; or take any other advantage of the absolute nature of those judgments which they have thus abandoned; or be regarded in any other way than as standing among those general creditors whose claims are not barred by the statute of limitations. (z)

In England and here, formerly, it was necessary, in the administration of a deceased debtor's estate, to attend to the distinction between debts due by specialty and those due by simple contract; because, according to the order in which the law directed the debts of the deceased to be paid, those due by specialty were to be first paid; and where the assets were insufficient to pay all, and the executor or administrator, in violation of this rule, paid them away in satisfaction of simple contract debts, he thereby made himself liable for the remaining unsatisfied specialty debts. (a) Where, however, the assets were sufficient to pay all, a simple contract debt might be safely paid, at any time, without regard to this precedence in favour of specialty debts. (b) But by our acts of Assembly, prescribing the order in which the debts of the deceased shall be paid from the personal assets; (c) and, on a deficiency thereof, from his real assets; (d) the distinction between debts due by simple contract and by specialty has been, in this respect, abolished; and, therefore, there can be no occasion to advert to it for any such purpose. It should, nevertheless, be attended to in all cases where the debtor has, by deed, bound his *heirs* as well as himself for the payment of the debt, as, in such cases, the creditor thereby has it in his power to sue and recover, at common law, from the heir alone, merely in respect of such assets descended, which the creditor cannot do upon any simple contract, or even specialty, whereby the *heir* has not been expressly bound. (e)

But it still continues to be important, here as in England, in reference to the statute of limitations, to look to the distinction between specialty and simple contract debts; because of the different limitations prescribed as an allowable bar to each. (f) A creditor

(z) *Sheppard v. Kent*, 2 Vern. 435.—(a) *Pinchon's case*, 9 Co. 88; Dep. Com. Gui. 125.—(b) *Turner v. Turner*, 1 Jac. & W. 39.—(c) 1793, ch. 101, sub ch. 8, s. 17.—(d) 1785, ch. 80, s. 7.—(e) *Hammond v. Hammond*, 2 Bland, 323.—(f) 1715, ch. 23, s. 2 and 6.

whose debt is secured by an instrument under seal, as by bond or deed, the money so secured is a specialty debt. In general where a deed and agreement will support an action of debt, the creditor is held to be a creditor by specialty; and there are a variety of cases, where a creditor whose debt is secured by a covenant; although for unliquidated damages, has been deemed to be a creditor by specialty. (g) But in the case of principal and surety bound by a bond, if the surety pays the debt he is considered only as a simple contract creditor of the principal. (h) Where money is lent upon a mortgage, and there is a personal covenant or stipulation, in the mortgage deed, for payment, or any further security, as a bond or contract under seal to pay the debt, it is one due by specialty; but, without any such covenant or further security, it is a debt by simple contract only. The mortgaged estate being nothing more than a pledge for the money borrowed; that is, for the personal debt; and as every loan of money creates a debt, whether there be a covenant or bond for the payment of the money or not, if there be no bond or personal covenant to pay the money it is merely a simple contract debt. (i)

But it appears, that the deed by which this debt was secured bears date on the 12th January, 1821; and that the claim was filed on the 16th of November, 1830, within less than twelve years after; therefore it cannot be affected by the statute of limitations, which has been relied upon against it by the other creditors, as regards the realty; in addition to which it has been established, as against the personalty, by an absolute judgment against the administrator. It is, however, clear, that as all the parties to this mortgage are before the court; and the mortgaged property is within the jurisdiction of the court, it must be first applied, so far as it will go, in satisfaction of this claim No. 5. And that the claimant, if not thus fully satisfied, must be allowed to come in here, to the amount of the balance, for a due proportion with the other cre-

(g) *Benson v. Benson*, 1 P. Will. 130; *Freemoult v. Dedire*, 1 P. Will. 429; *Gifford v. Manley*, Cas. Tem. Tal. 109; *Vernon v. Vawdry*, 2 Atk. 119; *Langley v. Furlong*, 1 Dick. 315; *Baily v. Ekins*, 2 Dick. 632; *Cheveley v. Stone*, 2 Dick. 782; *Broome v. Monek*, 10 Ves. 620; *Anonymous*, 18 Ves. 258; *Musson v. May*, 3 Ves. & B. 194; *Mavor v. Davenport*, 2 Cond. Chan. Rep. 395; *Marriott v. Thompson*, Willis, 186.—(h) *Jones v. Davids*, 3 Cond. Chan. Rep. 665; *Copis v. Middleton*, 11 Cond. Chan. Rep. 128.—(i) *Howel v. Price*, 1 P. Will. 291; *King v. King*, 3 P. Will. 358; *Meynell v. Howard*, Prec. Chan. 61; *Cope v. Cope*, 2 Salk. 449; *Galton v. Hancock*, 2 Atk. 435; *Waring v. Ward*, 7 Ves. 336; *Aldrick v. Cooper*, 5 Ves. 394; *Ex parte Digby*, 4 Cond. Chan. Rep. 110.

ditors, whose claims have the same grade and authenticity. (j) But as this personal property so mortgaged came to the hands of the defendant *Louis Mackall* as administrator *de bonis non*, he must be held accountable for it; and can only be discharged, in so far as it may appear, that it had been applied in satisfaction of the debt; and for so much as may not have been so applied, he alone must be charged.

The claims No. 14, 20, 25, 27, 28 and 37, are founded on specialties, not barred by the statute of limitations. Upon claims No. 14, 20 and 28, absolute judgments have been obtained against the administrator; and judgments for a proportion of the personal assets on claims No. 25, 27 and 37. The claim No. 22, the voucher of which was not filed here until the 11th of January, 1831, is founded on a note under seal, which became due on the 19th of December, 1815; and, therefore, it is clearly barred, unless it can, by some of the circumstances connected with it, be taken out of the statute.

The execution of the deed, upon which this claim, No. 22, is founded, has been admitted; and there are endorsed upon it several receipts for payments, one so late as the 4th of August, 1826; which, if shewn to be truly what they purport to be, would be sufficient to take it out of the statute of limitations. A man cannot be permitted to make evidence for himself; and the endorsements by the obligee, such as these, are not admitted to prove the original thing in demand; but being evidence in discharge of the obligor, they are only consequentially evidence in favour of the obligee, to take the case out of the presumption arising from the lapse of time. Even to this extent, however, they are regarded as evidence of a very questionable character, when it is recollected, that the security remains in the hands of the obligee; and that he may thus be under a continual temptation to fabricate such endorsements merely for the purpose of sustaining his claim for the balance. But to make such endorsements evidence for this purpose, it is necessary to shew, that they were actually made, as they bear date, within the time of limitation; for if they were made after that time, though they may be evidence of actual payments; yet they cannot be received as evidence to take the case out of the statute. (k)

(j) *Hammond v. Hammond*, 2 Bland, 384; *Greenwood v. Taylor*, 4 Cond. Chan. Rep. 351.—(k) *Humphreys v. Humphreys*, 3 P. Will. 397; *Glynn v. The Bank*, 2 Ves. 42; *Hillary v. Waller*, 12 Ves. 266; *Fladong v. Winter*, 19 Ves. 199; *Serle v. Barrington*, 2 Ld. Raym. 1370; *The Mayor of Hull v. Horner*, Cowp. 108.

Here there is no proof of the hand-writing of these endorsements, or that they were really made at the time they bear date ; nor of any other circumstance which can take this claim No. 22, out of the statute ; it must therefore be considered as barred.

The claims No. 6, 18 and 19, are founded on simple contracts, upon which absolute judgments have been obtained against the administrator ; the claims No. 9, 10, 12, 13, 15, 21, 23, 24 and 26, are founded on simple contracts on which judgments have been rendered against the administrator for a proportion of the personal assets ; and the claims No. 29 and 34, are founded on simple contracts, in satisfaction of which the administrator has bound himself by single bills to pay a proportion of assets. All these claims, considered as the simple contract debts of the intestate are clearly barred by the statute of limitations as against the realty ; but they are not so barred as against the personal estate by reason of those judgments and acknowledgments.

In the voucher exhibited of claim No. 8, it is said to have been secured by a deed of trust for a piece of ground in Georgetown ; but no such deed has been shewn to the court ; and, therefore, upon the proof, as it stands, this claim can only be regarded as a simple contract debt ; and, as such, is clearly barred by the statute of limitations relied on against it. The claims No. 16, 17, 32 and 33, have no other foundation than that of simple contracts ; and are evidently barred by the statute of limitations relied on against them.

The claim No. 7, is for costs on an absolute judgment which was recovered against the administrator ; and therefore, as it is a claim which, of itself, never existed against the estate of the deceased, it cannot now be made a charge upon his estate, and must be wholly rejected. The claims No. 30 and 31, it is also clear ; because of the circumstances and for the reasons stated by the auditor, in his report, cannot be sustained against either the personal or real estate of the deceased. They must therefore be altogether rejected.

It is agreed, that *Christiana*, the widow of *Benjamin Mackall*, deceased, be allowed for her dower, in the Prince Georges lands, the sum of one thousand dollars, to be paid to her by *Louis Mackall*, out of the bond given by him as a purchaser of a part of the land. Hence, it is unnecessary to speak of the principles of equity by which her right of dower might have been protected, and the arrangements of the funds which might have been made for that purpose.

It has been urged, that the reliance upon the statute of limitations by *The Bank of the United States*, comes too late after the auditor has made a report in favour of the claims they have thus attempted to oppose.

The auditor can be considered in no other point of view than as a ministerial officer of the court; upon whom the Legislature has not, nor cannot confer any portion of the judicial power assigned by the constitution to the Chancellor. The auditor is not only subject to the control of the court, but it is also made his duty to state such accounts as may be desired by either party. The auditor adjudicates upon nothing; but merely puts in order and prepares the materials upon which the court is to decide. His report, therefore, either for or against any claim, can in no manner affect the rights of any party. (*l*)

According to the course of the court, in a creditor's suit the statute of limitations may be relied on, at any time, by a party or a creditor who has neither done nor permitted any act to be done which must be considered as an express or tacit waiver of such a ground of defence or opposition to the claim. (*m*) In this case the right to rely upon the statute of limitations has been, in no manner, waived by *The Bank of the United States*, or by any other of the claimants by whom it has been insisted upon.

From this general review it appears, that claims, No. 1, 2, 3, 4, 5, 11, 14, 20, 25, 27, 28 and 37, cannot be affected by any reliance upon the statute of limitations in opposition to them; that claims No. 8, 16, 17, 22, 32, 33, 35 and 36, may be barred as against the whole estate so far as the statute of limitations has been relied upon against them; that claims No. 6, 9, 10, 12, 13, 15, 18, 19, 20, 21, 23, 24, 26, 29, 34 and 37, cannot be barred from having recourse to the personal estate by a reliance on the statute of limitations in opposition to them, although they may be barred as against the realty; and that claims No. 5, 6, 14, 18, 19, 20 and 28, having been established by absolute judgments against the administrator of the deceased have a right to go against the personal estate upon that foundation.

Upon recurring to the exceptions of the parties, it will be seen, that on the 2d of March, 1831, the day on which the auditor's report was filed, the claimants No. 1, 2 and 3, relied on the statute

(*l*) *Dorsey v. Hammond*, 1 Bland, 464; *Townshend v. Duncan*, 2 Bland, 45.—(*m*) *Welch v. Stewart*, 2 Bland, 41.

of limitations in opposition to claims No. 5, 6, 7, and 8; that the claimants No. 4, 5, 6, 7, and 8, by their exceptions filed on the 27th of March, 1831, relied on the statute of limitations in opposition to claims No. 1, 2, 3, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 26, 27, 29, 32, and 33; that on the 25th of January, 1832, the claimants No. 9, 10, 12, 13, 14, 15, 16, 17, 21, 23, and 24, by their exceptions, relied on the statute of limitations as a bar to claims No. 5, 6, 7, and 8; and that on the same day the claimants No. 4, 5, 6, 7, and 8, relied on the statute of limitations in bar of the claims No. 34, 35, 36, and 37.

But from what has been said in relation to these claims it appears, that although the claims No. 1, 2, 3, 5, 11, 14, 25, and 27, may be benefited, they cannot be injured by the application of the statute of limitations; that claim No. 4, on account of its priority of lien; and claims No. 7, 30, and 31, because of their being altogether excluded, cannot be, in any way, affected by the statute of limitations; and, therefore, since no man can, without utility to himself, be allowed capriciously to disappoint another of his just rights, they cannot be permitted to rely on it, either as a pretext for their own protection, or to the prejudice of any other claimant. Consequently, in marshalling the assets, in reference to the statute of limitations, as relied on, these four claims No. 4, 7, 30, and 31, must be entirely laid aside.

The leading objects, in arranging these funds, are to produce the greatest amount of satisfaction to each of the several creditors, allowing to each his just rights; to give to the most active those preferences and advantages which the law always awards to diligence; and to avoid any such conflict of interests as may prevent a distribution of the whole in such manner as to leave any one unsatisfied, so far as the assets will go, or as may deprive any one of his due proportion. Therefore, if conflicting pleas of the statute of limitations can be no otherwise adjusted, that which has been first filed must be allowed first to operate; and where pleas of the statute of limitations have been filed by different creditors, on the same day, so as to have a countervailing operation against each other, they must both of them, so far as they so operate, be rejected.

With regard to the account of the defendant *Louis Mackall*, as administrator *de bonis non*, it is clear, that all taxes, due on the real estate of an intestate, at the time of his death, must be paid by his administrator, as public charges entitled to a preference in

satisfaction from his personal estate. But this administrator craves an allowance for taxes which have accrued since the death of the intestate; but no such allowance can be granted. As to the credit for \$1,005, which the administrator insists on having allowed to him, I have already spoken of it in connexion with claim No. 5.

The personal estate of the deceased is to be regarded as an aggregate amount of value. It cannot be culled and parceled out so as to leave that which is of little or no value to rest as an incumbrance any where, or upon any one; but the whole must be so disposed of as to produce a clear average or aggregate amount for the benefit of all creditors first; and then for all who take after them. If, as is alleged, in this instance, the personal estate be composed in part of aged or infirm slaves, who are unable to maintain themselves, they must be disposed of with other portions of the personalty, so as not to leave them as a burthen upon any one, or upon the county. The right to have such slaves maintained by the owner, in discharge of the county, has been expressly given as a public claim, by which the estate of the deceased owner is bound; (n) and therefore, the administrator must, at his peril, make such a disposition of the estate, if practicable, as to secure to the public, that right; and he cannot be allowed, to the prejudice of the creditors, or next of kin of the deceased, to retain any thing for the maintenance of such aged or infirm slaves.

Whereupon it is *Ordered*, that this case be and the same is hereby again referred to the auditor, with directions to state a final account. The claim No. 4, is to be first and fully satisfied from the proceeds of the real estate that has been sold; and then from the same proceeds, the amount agreed upon, according to the terms of the agreement, is to be allowed to *Christiana Mackall*, the widow, in lieu of her dower; and then, after the satisfaction of these claims, the residue of the proceeds of the realty is to be applied in full satisfaction of claim No. 11; after which an amount is to be set apart equal to the full satisfaction of claims No. 35 and 36. The claims No. 5, 6, 18, 19, 20 and 28, are to be first fully satisfied out of the personal estate, or so far as it will go, so as distinctly to shew the deficiency, if any, to be made up to each of those claimants out of the realty. But if a surplus of the personalty should remain, after

(n) 1796, ch. 67, s. 13 and 29; 1824, ch. 100; *Keane v. Boycott*, 2 H. Blac. 511, note.

satisfying those claims, then a complete distribution thereof is to be made among the claimants No. 6, 9, 10, 12, 13, 15, 18, 19, 20, 21, 23, 24, 26, 29, 34 and 37. Then a dividend is to be made of the real and personal estate, among the claimants No. 1, 2, 3, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34 and 37, so as to put each of them upon an equal footing, as nearly as practicable, with each other and all other claimants, except the dower claim, and claims No. 4, 11, 35 and 36, and as if the claims No. 5, 6 and 8, were allowed to come in among the divisors; and then the whole residue of the estate, real and personal, is to be so distributed as to give claims No. 35 and 36 a preference for a full satisfaction against all, except claims No. 5, 6 and 8; and so as to apply the whole in satisfaction of the several remaining claims, until they are all as fully and as equally satisfied as may be, according to their respective rights. In making this final arrangement and distribution of the funds, real and personal, of this deceased debtor, the auditor is further directed to reject claims No. 7, 30 and 31, together with all others, which do not appear, at the time he makes his statement, to be fully and correctly authenticated according to the course of the court.

And it is further *Ordered*, that the exceptions to the auditor's report of the accounts of the defendant *Louis Mackall*, as administrator *de bonis non*, be and the same are hereby sustained and allowed; except as to the objections to the items in account A. from No. 1 to No. 8 inclusive, which have been abandoned; *Provided*, that as regards the exceptions against the allowance for \$1,005, it be shewn, that the whole value of the slaves mentioned in the mortgage deed of the 12th of January, 1821, has been applied by the administrator in satisfaction of claim No. 5, otherwise for so much only as has been so applied.

In pursuance of this order, the auditor made, and on the 21st of May, 1832, filed a report of a final account, distributing the whole proceeds of the estate of the deceased among his creditors who had come into this court; three of whom had filed the vouchers of their claims since the passing of the order of the 14th of February. The auditor in this report says, that the administrator *de bonis non* had failed to produce the evidence which was required to entitle him to the credit for \$1,005, mentioned in that order; that the circumstances disclosed, induced the auditor to believe, that the administrator might be entitled to the credit, though some

considerable time might be required to collect his proofs and explanations. And as there was already a large sum of money in court, laying unproductive, the auditor had, therefore, thought it best to report immediately, and therein assume, that the administrator was entitled to such an allowance, the right to which might be suspended; so that if it should ultimately be determined against him, a distribution of the amount might be made without disturbing the accounts which were then reported. That he had accordingly stated an account between the administrator *de bonis non*, and the estate; and thereby corrected his former accounts agreeably to the directions given. And after allowing the credits as ordered, with some others proved by the vouchers lately filed, and the sum of \$1,005; there appeared to be a balance in the hands of the administrator of \$3,184 71, as of the 26th of July, 1830, the day of the first sales of the real estate. In all other respects the auditor's statements conform substantially to the directions given.

It appears, that the gross amount of the sales of the real estate were \$16,539 92; from which were deducted \$683 17, for commission allowed to the trustees who made the sales, and \$166 46 for costs; leaving a balance of \$15,681 29 as the neat proceeds of the realty which, with the balance in the hands of the administrator, gave a sum total of \$18,866 to be distributed, in the manner directed, among those of the forty creditors whose claims were not altogether rejected. Four of those creditors, No. 4, 11, 35 and 36, including \$1,000 allowed to the widow as directed, amounting to \$7,873 44, were, upon the principles laid down, entitled to a preference, and were awarded a full satisfaction accordingly. The rest of the creditors who had established their claims were allowed a due proportion of the balance of the estate, amounting to \$9,992 56, according to the amount of their respective claims as directed.

18th June, 1832.—BLAND, Chancellor.—*Ordered*, that the foregoing report of the auditor be and the same is hereby ratified and confirmed; and the said administrator and trustees are directed to apply the assets and proceeds accordingly with a due proportion of interest. But the final adjustment of the account of the administrator *de bonis non*, and the further extent of his liability are hereby suspended for the reasons suggested by the auditor until further order.

After which the proceeds of the sales, as collected, were, from time to time, brought into court, and distributed, with an allowance

of five *per cent.* to the trustees for all sums collected by them by suit as attorneys at law. Without any further controversy as to the rights of the creditors or parties, the case seems to have been, on the 28th of September, 1836, finally closed.

HALL v. McPHERSON.

On the filing of a bill for an injunction the defendant may instantly put in his answer, so as thereby to prevent the granting of an injunction as prayed.—A party may be compelled, in a summary way, to pay the costs due to a commissioner.

As by a decree to account the defendant becomes an actor, the plaintiff cannot thereafter dismiss his bill without notice to the defendant by a rule further proceedings.—A person who has been finally discharged under the insolvent law cannot sue or be sued in relation to any property so transferred to his trustee for the benefit of his creditors.—A discharge under the insolvent law of a party to a pending suit, does not operate as an abatement; but the suit becoming thereby defective, the defect must be removed before the suit can be allowed to proceed.

THIS bill was filed on the 21st of April, 1826, by *Thomas I. Hall*, administrator of *Thomas Tongue*, against *Thomas T. McPherson*. It states, that on the first of July, 1822, a partnership was formed under the firm of *Tongue & McPherson*, between the intestate of the plaintiff and the defendant, which was carried on until the first of November, 1825; of the profits of which *Tongue* was to have two-thirds and *McPherson* one-third. That immediately on the dissolution of this firm they entered into another co-partnership, the profits of which they were to share equally under the firm of *Thomas T. McPherson & Co.* which continued until *Tongue's* death; which happened on the 2d of January, 1826. After which letters of administration on his estate were granted to this plaintiff. That both of these firms were largely indebted; that the stock of goods remaining on hand, and in the possession of the defendant, was very considerable; which, with the debts due to them, if properly managed, would be sufficient to satisfy all the claims against them and leave some surplus. That the defendant, although frequently requested, had not exhibited to the plaintiff any statement of the transactions of those firms. That the defendant, since the death of the plaintiff's intestate, had continued to carry on business, and was selling the stock of goods belonging to the two firms without taking any inventory thereof; or in any

other manner ascertaining the amount, quantity, or value of the partnership effects. That the defendant has no property; except his interest in those co-partnerships; and his conduct had been such as to hazard the interests of those joint concerns, and was calculated to injure the estate of the plaintiff's intestate, and to expose it to loss and waste; and that the defendant's selling the partnership property and effects at retail was improper, because it should be sold at public sale.

The bill then prayed for an account; the plaintiff thereby offering to admit the defendant as a creditor of the estate of his intestate for whatever might appear to be due to him from those joint concerns; for general relief; and for an injunction commanding the defendant to refrain and surcease from selling the goods, property, and effects belonging to either of the co-partnerships, and also from collecting and receiving any of the debts due and owing thereto, &c.

On the same day the defendant put in his answer, in which he admitted, that the two partnerships had been formed and carried on; and were largely indebted as stated: that the goods which came to his possession as surviving partner, and were then on hand, would amount, if sold at retail upon short credit, to about \$2,000; but, if forced into market, and sold at auction for cash, would not command any price near their original cost. That without great care and diligence in winding up the two joint concerns, their effects would not be sufficient to meet the claims against them: that the stock of goods on hand was the only effectual means which the defendant had, to meet the urgent demands made against him as surviving partner; that, since the death of the plaintiff's intestate, this defendant had disposed of a part of the joint effects in the best possible manner, and applied the proceeds in satisfaction of the claims against them. That he had in all things done his best to preserve the interests of the two partnerships; and the plaintiff's allegations, that he had put those interests at hazard, and had no other property, were false. That this defendant was never requested by the plaintiff to furnish him with a statement of the transactions of the firms; on the contrary, the plaintiff had always had free access to the books of the concerns, and the defendant had always been ready and willing to give any information on the subject within his power; that an inventory of the goods on hand had been taken a short time before the death of the plaintiff's intestate, and the amount par-

ticularly ascertained; that the estate of the plaintiff's intestate would be inadequate to pay his debts, and this defendant would be seriously injured in consequence thereof; and that this defendant has not been able to ascertain the aggregate of the debts against the two firms, &c.

26th April, 1826.—BLAND, *Chancellor*.—The defendant's solicitor called upon the Chancellor at his office, and asked leave to lodge with him an answer to a bill which, he said, would soon be laid before him. In a few hours after the bill was accordingly presented. The Chancellor apprised the plaintiff's solicitor of these circumstances; and, after hearing his remarks, has read and considered the bill and answer.

It often occurs, in cases where the suit has been amicably instituted, that the bill and answer are filed together, and that some order is passed thereon at once. But this is not said to be, nor does it, in any respect, wear the aspect of an amicable call for the aid, or sanction of the court, to have that done on a statement of facts about which the parties are agreed, or which they are willing should be done. The parties here are substantially opposed as to every object of this suit; and they apprised the Chancellor, that they were so before he read either the bill or answer.

The prompt manner in which the defendant has chosen to come in and answer is unusual; perhaps, indeed, such an instance never happened before. But I am not aware of any practice of this court, or, of any principle, governing the administration of justice, which prohibits a defendant from answering instantly to any complaint that may be made against him. On the contrary, courts of justice, whether of common law or of equity, not only allow a party to come in and immediately defend himself; but consider a promptness in doing so as highly commendable. The various formalities, intervals, and pauses of the process, warning, summoning, or coercing a defendant to appear and answer, are intended for his benefit; and to allow him time to deliberate, and to move in the most circumspect manner in the defence of his rights; and being for his advantage only, he may waive them all; and, as in this instance, come in and answer instantly. By doing so he accelerates the progress of the case which must be for the advantage of him who complains of a delay or denial of right. This plaintiff may now except to this answer, set the case down to be heard on bill and answer, or put in a general replication and proceed forthwith to take testimony. In short any defendant to a bill

of complaint in this court may appear gratis and get rid of the suit as soon as he can. (a)

But it is said, that this is an injunction bill, and an injunction, if allowable at all, is always granted *ex parte* on a consideration of the bill alone. This practice has, however, arisen out of the circumstances of our country, and the peculiar urgency of such cases. The exigencies of the case, as set forth by the plaintiff, in his bill, may be, and most commonly are, such as to call for immediate interposition; and therefore, the Chancellor must act on the representation of one party only. But in all such cases the opposite party is allowed an early opportunity of being heard; and if the nature of the case require it, the manner and time of his being heard is unusually facilitated and shortened. But if a defendant should hear of such a bill being on its way to the Chancellor, it does not seem to me, that there can be any sound regulation which should hinder him from following the bill to the tribunal, and instantly presenting his answer so as to prevent the imposition of the threatened restriction. An injunction may be dissolved on the coming in of an answer which positively denies all the facts upon which the equity of the bill is founded; hence it would be strange indeed to refuse to look at such an answer presented together with the bill, and to grant an injunction which must soon, and inevitably be dissolved. I am therefore of opinion, that this answer must be now read and considered. Upon which it will be sufficient to remark, that on the bill alone I should have doubted the propriety of granting an injunction; but upon looking into the answer I can have no doubt.

Ordered, that no injunction be issued as prayed by this bill of complaint.

The plaintiff put in a general replication to the defendant's answer; and some time after brought the case before the court by moving for a decree to account.

27th July, 1826.—BLAND, Chancellor.—*Decreed*, that the parties account with each other; and the case is hereby referred to the auditor, who is directed, from the proofs now in the case and such other proofs as may be produced by either party upon giving reasonable notice to the parties to state one or more accounts as

(a) *Fell v. The Master of Christ's College*, 2 Bro. C. C. 278; *Hanwarst v. Welleter*, 5 Mad. 422; *Webster v. Threlfall*, 1 Cond. Chan. Rep. 67.

the nature of the case may suggest ; and to report his proceedings to the Chancellor.

By consent a commission was issued to *Joseph G. Harrison* to take testimony ; who accordingly took the depositions of several witnesses and returned them with the commission. After which he filed a petition in which he stated, that his fees, as commissioner, against the defendant amounted to the sum of \$16, which he had neglected to pay, although repeatedly called on so to do. Whereupon he prayed for an order for payment.

15th May, 1829.—BLAND, Chancellor.—Ordered, that the defendant *Thomas T. McPherson* forthwith pay to the commissioner *Joseph G. Harrison*, the sum of sixteen dollars, being for his commission fees as above stated.

On the 9th of March, 1832, the plaintiff filed a supplemental bill in which he stated, that the defendant *Thomas T. McPherson* had on application to Anne Arundel County Court, been finally discharged under the insolvent law, that *Robert McPherson* had been appointed trustee for the benefit of his creditors ; and that soon after *Thomas T. McPherson* died utterly insolvent ; that no administration had been, or would be granted on his estate ; by reason whereof this suit had abated. Whereupon he prayed, that it might be revived against *Robert McPherson*, the trustee of the late defendant, &c. The *subpœna* issued on this bill was returned summoned to March term, 1832.

The plaintiff, by his petition, filed on the 20th of July, 1832, prayed to have leave to dismiss his bill, and for the usual order in such case.

26th July, 1832.—BLAND, Chancellor.—This case having been submitted with notes by the plaintiff's solicitor, and no one appearing for the defendant before the close of the sittings of the term, the proceedings were read and considered.

The application of a plaintiff to dismiss his bill is one which is, ordinarily, granted as of course, at any stage of the proceedings, on the payment of costs. (b) But in this case there having been a decree to account, each party has been thereby virtually clothed with the rights of an actor ; after which the defendant having

(b) 4 Ann. c. 16, s. 23 ; Kilty's Rep. 247 ; Anonymous, 1 Ves., jun., 140 ; Dixon v Parks, 1 Ves., jun., 402.

obtained the benefit of the insolvent law, other persons became thereby interested in the matter in litigation; and the defendant, having died, after he had been thus discharged under the insolvent law, and the suit having been revived by a supplemental bill against his trustee alone, this application by the plaintiff to dismiss his bill presents questions of much importance in practice, and of a nature involving a consideration of some of the positive provisions of the insolvent law, and of the principles arising out of those provisions.

In all cases where a defendant is chargeable with the rents and profits of property; and wherever it may be necessary to ascertain the amount to be awarded to the plaintiff, it is of course to refer the case to the auditor, with directions to state such an account as the nature of the case may require, and such other accounts as either party may desire. But a reference to the auditor in such cases does not, of itself, place the parties in the reciprocal relation to each other of plaintiff and defendant, as on a bill for an account upon a dealing in trade, as in this instance, where, after a decree to account, both parties are considered as actors in relation to such account; and the final decree may be in favour of the one or the other, according as the balance may appear. And, therefore, if the suit should abate after such a decree, by the death of either plaintiff or defendant, the surviving party, or the representatives of the deceased may have it revived by a bill of revivor; because, the defendant, after such a decree, has as direct an interest in the continuance of the suit as the plaintiff, and may ultimately be as essentially benefited by it. (c)

But, as in such cases, that reciprocal interest in the suit which the decree to account gives to each of the parties enables either of them to revive and continue it, so the plaintiff cannot, as under other circumstances, be allowed at his pleasure, after such a decree, to dismiss his bill on the payment of costs; but can only get rid of it by a final decree, or by availing himself of the negligence and default of the defendant after he has been called upon to proceed; and therefore, after a decree which thus gives the defendant

(c) *Kent v. Kent*, Prec. Cha. 197; *Stowell v. Cole*, 2 Vern. 219, 297; *Dones' case*, 1 P. Will. 263; *Hollingshead's case*, 1 P. Will. 744; *Anonymous*, 3 Atk. 691; *Thorn v. Pitt*, Sele. Ca. Cha. 54; *Dinwiddie v. Bailey*, 6 Ves. 141; *Williams v. Cooke*, 10 Ves. 406; *Horwood v. Schmedes*, 12 Ves. 311; *Bayley v. Edwards*, 3 Swan. 703; *Bodkin v. Clancy*, 1 Ball. & B. 217; *Smith v. Marks*, 2 Rand. 449; *Moreton v. Harrison*, 1 Bland, 499; 1825, ch. 158.

an interest in the further prosecution of the suit, the plaintiff can only have entered upon the docket the common rule further proceedings, so as thereby to lay a foundation for obtaining leave to dismiss his bill at the next term. (*d*)

In England any trader may, under certain circumstances, be subjected by his creditors to the operation of the bankrupt law so as thereby to have his property taken from him and transferred to assignees for the benefit of his creditors; and consequently, so long as the commission of bankruptcy, sued out against him, remains in force, as he has been thereby totally divested of all property then held by him, not as trustee or in right of another, and which might be made liable to the payment of his debts, he cannot nor ought not to be allowed to sue or be made a party to any suit at law or in equity in regard to any such property; unless under peculiar circumstances. (*e*)

Here, to enable a debtor to obtain the benefit of the insolvent law he must be then, at the time of his application, in actual confinement, (*f*) or he must give two months notice of his application in the manner prescribed. (*g*) And it is declared, that, on the applicant having taken the prescribed oath, the court, upon the recommendation of the creditors, if they make any, shall appoint a trustee for their benefit; which appointment shall operate as an assignment of all the insolvent's property so as to vest the title to the same in such trustee, who shall manage, sell, and distribute the same in the manner prescribed, and under the control of the court to which the application has been made. (*h*) And after the trustee has given bond, and the applicant has conveyed to him all his estate for the benefit of his creditors, and the trustee has certified, that he is in possession of all the estate of the applicant mentioned in his schedule, (*i*) the court may order that such applicant shall be discharged, as well from all debts, covenants, promises, and agree-

(*d*) *Skip v. Warner*, 3 Atk. 558; *Carrington v. Holly*, Dick. 280; *Anonymous*, 11 Ves. 169; *Lashley v. Hogg*, 11 Ves. 602; 1 Harr. Pra. Cha. 605.—(*e*) *Copeman v. Gallant*, 1 P. Will. 314; *Bennet v. Davis*, 2 P. Will. 316; *Griffin v. Archer*, 2 Anst. 478; *Benfield v. Solomons*, 9 Ves. 83; *Whitworth v. Davis*, 1 Ves. & B. 515; *Wilkins v. Fry*, 1 Meriv. 245; *Hammond v. Attwood*, 3 Mad. 158; *Bailey v. Vincent*, 5 Mad. 48; *Lloyd v. Lander*, 5 Mad. 282; *Piercy v. Roberts*, 6 Cond. Cha. Rep. 469; *Casborne v. Barsham*, 9 Cond. Cha. Rep. 289; *Winch v. Keeley*, 1 T. R. 619; *Worthington v. Lee*, 2 Bland, 682.—(*f*) 1805, ch. 110, s. 2; 1808, ch. 71.—(*g*) 1805 ch. 110, s. 21; 1834, ch. 209.—(*h*) 1805, ch. 110, s. 2, 4, 7 and 10; 1812, ch. 77, s. 6; 1820, ch. 194; 1827, ch. 70, s. 3; 1832, ch. 203, s. 3; 1835, ch. 235.—(*i*) 1805, ch. 110, s. 5; 1827, ch. 70, s. 1; 1829, ch. 208, s. 3.

ments due from, or owing or contracted in his individual, as also in his partnership capacity, before the time of his application; *provided*, that no person who has been guilty of a breach of the law, and has been or is liable to be fined shall be discharged from any such fine; and *provided*, that any property which he shall thereafter acquire by gift, descent, or in his own right by bequest, devise, or in any course of distribution shall be liable to the payment of such debts; and *provided also*, that the discharge of such applicant shall not operate so as to discharge any other person from any debt. (*j*) But, that all property of the applicant, not mentioned in his schedule, shall be subject to execution and attachment, in the same manner his property was prior to his application. (*k*)

From which it appears, that the property of a debtor cannot here, as in England, be placed under the insolvent law in any way by the mere act of any of his creditors; that it can only be so disposed of upon the voluntary application of the insolvent debtor himself; and that the transfer, when so made, being less open to question, because of its being voluntary, and in all respects as absolute as an assignment under the bankrupt law of England, the reason why an insolvent here should not be allowed to sue or be made a party to a suit in relation to property, not then held by him as trustee, or in right of another, and so transferred, is much stronger than that which arises from an assignment under the analogous provisions of the English bankrupt law. (*l*) The English bankrupt law is, in general, administered upon the principle, that there will be no surplus of the bankrupt's estate to be returned to him; our insolvent law, in terms, proceeds upon the same principle by expressly declaring, that its benefit is to be granted only to those who, by reason of their misfortunes, are unable wholly to pay their debts. (*m*) Nevertheless, under some circumstances, an insolvent here, like a bankrupt in England, may be permitted to institute a suit, or be made a party for his own protection, or for the purpose of detecting and preventing the practice of fraud; or where the necessary relief cannot be obtained according to the mode of proceeding prescribed by the insolvent law. (*n*)

(*j*) 1805, ch. 110, s. 5; 1827, ch. 70, s. 6; 1830, ch. 125; 1831, ch. 316, s. 7; Buxton v. Mardin, 1 T. R. 80; Spalton v. Moorhouse, 6 T. R. 366; Nadin v. Battie, 5 East. 147.—(*k*) 1827, ch. 70, s. 8; Some other provisions have been since made in relation to insolvent debtors in the city and county of Baltimore, by 1834, ch. 293.—(*l*) Collet v. Wollaston, 3 Bro. C. C. 228; Collins v. Shirley, 4 Cond. Cha. Rep. 592.—(*m*) 1805, ch. 110, s. 1.—(*n*) Bowser v. Hughes, 1 Anst. 101;

Hence it may be regarded as a general rule, that in all cases where a debtor has, before the institution of a suit by or against him, been finally discharged under the insolvent law, he cannot be allowed to sue or be made a party to a suit in respect to any property which has been rightfully transferred in pursuance of the insolvent law for the benefit of his creditors; because having parted with all his interest therein, he has thereby divested himself of all capacity to sue or be sued in relation to any such property. But where a debtor has, pending a suit to which he is a party, been finally discharged under the insolvent law, other principles arise which have occasioned some perplexity at law as well as in equity.

It seems to be well settled in England, that a discharge and assignment under the insolvent law does not, of itself, operate as an abatement of any action at common law which may have been previously instituted by the insolvent; because, although the discharge and assignment do legally divest him of all property claimed by such action, and transfer it to his trustee for the benefit of his creditors; yet the insolvent may well be allowed to proceed with the prosecution of the suit for the benefit of his creditors until the trustee interferes and claims adversely to him, in which case, he will not be allowed to recover that which is in law the property of the trustee, and is claimed as such. (*o*) It is also laid down, that the insolvency of the defendant does not, of itself, abate any action at common law. (*p*)

By our insolvent law it has been declared, that the trustee of the insolvent's estate may, in his own name or in that of the applicant, sue for, collect and recover all debts, demands and property due or belonging to the applicant and assigned by him to such trustee; and that such trustee may also prosecute to judgment any suit commenced by the applicant before his appointment. (*q*) These provisions seem to be confined to actions at common law; and also to such cases of that description only in which the plaintiff,

King v. Martin, 2 Ves., jun., 641; Williams v. Kinder, 4 Ves. 387; Benfield v. Solomons, 9 Ves. 83; Saxton v. Davis, 18 Ves. 81; Whitworth v. Davis, 1 Ves. & B. 548; Lowndes v. Taylor, 1 Mad. Rep. 422; Mackworth v. Marshall, 5 Cond. Cha. Rep. 157; Piercy v. Roberts, 6 Cond. Cha. Rep. 469; Barton v. Jayne, 9 Cond. Cha. Rep. 461.—(*o*) Monke v. Morris, 1 Mod. 93; Hewit v. Mantell, 2 Wils. 372; Kretchman v. Beyer, 1 T. R. 463; Winter v. Kretchman, 2 T. R. 45; Waugh v. Austen, 3 T. R. 437; Kitchen v. Bartsch, 7 East. 63.—(*p*) Hewit v. Mantell, 2 Wils. 374.—(*q*) 1805, ch. 110, s. 8; 1827, ch. 70, s. 2.—Some further provisions have been since made as to the continuance of suits where a change is made of a permanent trustee of an insolvent debtor of the city and county of Baltimore, pending a suit instituted by or against such trustee, by the act of 1833, ch. 173.

or he who must otherwise have been the plaintiff, has been finally discharged under the insolvent law. There is, however, no legislative enactment prescribing any *mode* by which a trustee of an insolvent plaintiff may be allowed to come in, and prosecute a suit which the insolvent had previously instituted; or by which a trustee of an insolvent defendant may be allowed to come in and make defence in a pending suit, the recovery in which may be of no consequence to the insolvent; but which may greatly reduce the dividends of his creditors. According to the course of the courts of common law here, as in England, the trustee of an insolvent plaintiff has always been permitted to come in at any time and claim for the benefit of his creditors, either on motion, or by *scire facias*. The most usual course seems to be to come in on motion; but if the claim of the trustee, as such, be questioned, then the court will intercept or stay the paying over of the proceeds so as to give the trustee time to sue out a *scire facias* for the purpose of having the matter in controversy regularly determined. (*r*)

The insolvent law has no distinct provision whatever in relation to any kind of suit in equity to which an insolvent may be a party, and which may be depending at the time of his final discharge. But, although in equity as at law, a party to a then depending suit may, by his having obtained the benefit of the insolvent law, be thereby deprived of all right to the property in litigation held or claimed in his own right, and not as trustee or in right of another, and have been so, apparently, entirely divested of his capacity to sue or be sued in relation to it; yet here, as at law, such a discharge does not, as in the case of death, operate as an abatement of the suit. Upon the ground, as it would seem, that a discharge under the insolvent law operates only as a transfer of the insolvent's interest for the benefit of his creditors; but does not, as in case of death, effect a total prostration and extinction of all his rights. Hence, although an insolvent discharge cannot be said to be strictly an abatement of the suit, yet, that circumstance renders it as defective as if it had abated by death; which defect, when made known to the court, must be remedied before the suit can proceed. The proper mode of reinstating a suit in equity, in such cases, is by a supplemental bill in the nature of a bill of revivor. So that, in general, upon the final discharge under the insolvent law of a plaintiff or defendant being suggested upon the record, the case may be ordered to stand over, with notice to the

trustee of such insolvent to come in by a certain day to proceed to reinstate the case, or that the bill be dismissed. Or, on the insolvency of a party his trustee may voluntarily come in by a supplemental bill in the nature of bill of revivor, and thus obtain the right to prosecute or defend the suit for the benefit of the creditors of the insolvent. (s)

This suit has, however, not only become defective by the insolvency of the defendant, who, as well as the plaintiff, was at that time an actor in relation to the account, and the benefit which might result from it; but it was afterwards totally abated by the death of the defendant; and the plaintiff might, if he had thought proper, have suffered it finally to go to rest in that manner. For, although, in consequence of the late defendant's having been made an actor by the decree to account, his trustee or legal representative, might, after his insolvency and death, have come in by bill and had the suit revived; yet since it had, by operation of law and by casualty, been brought to a final termination, the plaintiff was certainly under no obligation to revive or renew the litigation. He has, however, by his supplemental bill, in the nature of a bill of revivor, brought this case again before the court, and it now stands in the situation of a bill, answer, and decree thereon for a mutual account between partners in trade. And, therefore, the bill can now only be dismissed in the same manner as after a similar decree between the original parties; that is, upon notice to the opposite party by a rule further proceedings.

Whereupon it is *Ordered*, that the defendant proceed in this case on or before the fourth day of the next term, or the plaintiff may, at any time thereafter, dismiss his bill with costs. And it is further *Ordered*, that the register enter upon the docket, as at the instance of the plaintiff, the rule further proceedings.

The rule was entered accordingly. After which, no further proceedings having been had by the defendant, the bill was on the 5th of October, 1832, by order of the plaintiff's solicitor, dismissed.

(s) Child v. Frederick, 1 P. Will. 266; *Ex parte* Ellis, 1 Atk. 101; Anonymous, 1 Atk. 263; *Ex parte* Berry, 1 Dick. 81; Hall v. Chapman, 1 Dick. 348; Sellers v. Dawson, 2 Dick. 738; Rutherford v. Miller, 2 Aust. 458; Williams v. Kinder, 4 Ves. 387; Monteith v. Taylor, 9 Ves. 615; De Minckwitz v. Udney, 16 Ves. 466; Randall v. Mumford, 18 Ves. 421; Boddy v. Kent, 1 Meriv. 362; Rhode v. Spear, 4 Mad. 51; Wheeler v. Malins, 4 Mad. 171; Porter v. Cox, 5 Mad. 80; Garth v. Thomas, 1 Cond. Chan. Rep. 410; Hibberson v. Fielding, 1 Cond. Chan. Rep. 502; Sharp v. Hullett, 1 Cond. Chan. Rep. 558; Caddick v. Masson, 2 Cond. Chan. Rep. 252.

RIDGELY v. IGLEHART.

Lien in its proper sense is a right which the law gives; although it is usual to speak of lien by contract.—Of liens given by the common law, by equity, by marine law, by statute, and by contract.—The lien given by the act to direct descents, repudiates every thing like an equitable lien, and can only be enforced at common law as a statutory lien incident to the bond with which it has been blended.—Where, under the act to direct descents, one of the heirs, under an order of sale purchases the whole, and gives bond with another heir as his surety, the lien of such a bond is exclusive of the interests of such obligors.—Where one heir sues upon such bond and obtains a judgment; and by virtue of an execution thereon, has the land bound by such statutory lien taken and sold, he thereby extinguishes his lien.

THIS bill was filed on the 30th of November, 1831, by *Robert Ridgely* against *Michael Iglehart*. From which and its exhibits it appears, that *William Ridgely* died intestate, seised in fee simple of certain parcels of land which descended to the plaintiff, to *Isaac Ridgely*, *Reuben Ridgely*, *Amelia Ridgely*, and *Priscilla* the wife of the defendant, as his children and heirs at law. That on a petition by two of them to Anne Arundel County Court, to have those lands divided among them, a commission was issued under the act to direct descents; (a) and the commissioners having returned, that they would not admit of division, they were ordered to be sold on a credit of twelve months; the whole containing one hundred and seventy-seven acres and three-quarters, was sold accordingly on the 19th of February, 1824, to *Reuben Ridgely*, one of the heirs, for \$8 26 per acre, amounting to \$1,468 21; for which he gave bond, with *Amelia Ridgely*, another of the heirs, as his surety, to the state, with a condition, that he should, on the 19th of February, then next, pay to the respective heirs of *William Ridgely*, deceased, namely, *Robert Ridgely*, *Amelia Ridgely*, *Isaac Ridgely*, and *Ethelbert Iglehart*, only child and heir of *Priscilla*, their executors, administrators or assigns, their equal and just proportions of the amount of the sale of the real estate of the aforesaid *William Ridgely*, sold under the order of Anne Arundel County Court, with interest thereon from the 19th of February, 1824. That afterwards a suit was instituted on this bond in Anne Arundel County Court for the use of *Ethelbert Iglehart*, by *Michael Iglehart* his next friend, against *Reuben Ridgely*; and on the 18th of April, 1827, a judgment was recovered for \$2,936, to be released on the payment of \$293 64, with interest thereon from the

19th of February, 1824, and costs. Upon which judgment execution was issued and levied upon the lands which had so descended; and, at the sale by the sheriff, this defendant became the purchaser of the whole for the sum of \$288 55; and the sheriff executed a deed to him accordingly, which has been duly recorded. That no part of the share of this plaintiff in the purchase money arising from the sale of the lands as descended, has been paid by *Reuben Ridgely*, or by any person claiming from or through him, to this plaintiff; and that his part of that purchase money, with the interest thereon, remains wholly due and unsatisfied. That this plaintiff is advised, that he has an equitable lien on all the real estate descended, to secure the payment of his proportionable part of the purchase money, into whosoever hands the same may have come. Whereupon he prayed, that the defendant *Michael Iglehart* might be decreed to pay to the plaintiff his proportion of the purchase money by a fixed day, or that, in case of his failure to do so, the land might be sold to pay what was due to this plaintiff, and for such other relief, &c.

Whereupon a *subpœna* having been issued and returned served, the defendant appeared and put in the following demurrer.

The demurrer of *Michael Iglehart* of Anne Arundel county to the bill of complaint of *Robert Ridgely* against him in Chancery exhibited. This defendant by protestation not confessing or acknowledging all or any of the matters or things in the complainant's said bill of complaint to be true in manner and form as they are therein alleged, for answer thereto this defendant doth demur in law. And for cause of demurrer says, that the said bill contains not any matter of equity whereon this court can ground any decree, or give the complainant any relief, or assistance as against this defendant. That if the matters stated in said bill do give the complainant any cause of complaint or action against this defendant the same is triable and determinable at law, and not to be enquired into by this court. That the state of Maryland is, by the complainant's own shewing, a proper and necessary party to any suit or action in this court which may be prosecuted touching the matters alleged in said bill. And that the heirs at law of *William Ridgely* in said bill named, are likewise proper and necessary parties thereto. Wherefore, and also for divers other errors and imperfections in said bill, this defendant doth demur thereto and prays the judgment of this court whether he ought to make further answer; and also prays to be hence dismissed with his costs, &c.

30th July, 1832.—BLAND, *Chancellor*.—This case standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

The plaintiff founds his right to sue this defendant alone and in this court upon the circumstance of his claim being altogether or in some essential particulars, of an equitable character only; and upon the fact, that the property held by this defendant has been bound for the satisfaction of his claim, and may be followed and taken by him alone without regard to any other similar and contemporaneous claims upon it; and also without regard to the manner, or to any one from whom this holder of it may have derived title after it had become so bound. And all this the plaintiff seems to conceive, necessarily arises from his being, as he alleges, the holder of an equitable lien upon the land.

The term *lien* is applied in various modes; but, in all cases, it signifies an obligation, tie, or claim annexed to, or attaching upon property without satisfying which such property cannot be demanded by its owner. (b) Lien, in its proper sense, is a right which the law gives. But it is usual to speak of lien by contract, though that be more in the nature of an agreement for a pledge. And there are liens which exist only in equity, and of which equity alone can take cognizance. (c) The existence of a lien, however, and the benefit which may be derived from it, as well as the mode in which that benefit may be obtained, depend upon principles of law and circumstances so various, that it is always indispensably necessary carefully to attend to those particulars by which its very substance may be materially affected. For all the purposes of the present enquiry, however, liens may be regarded as of two kinds; such as are sustained by the principles of common law or of equity upon the peculiar circumstances of the case; or such as arise out of positive legislative enactment; but all liens are essentially different from that priority of satisfaction, the right to which is given by act of Congress to the United States. (d)

A lien given by the common law for the benefit of trade, and the like, such as that by which a factor may hold the goods of his principal, or that by which an innkeeper may detain the goods of his guest, &c., until he is paid, is always associated with posses-

(b) Jacob Law Dict. v. Lien.—(c) Gladstone v. Birley, 2 Meriv. 403.—(d) The United States v. Fisher, 2 Cran. 358; Conrad v. The Atlantic Insurance Company, 1 Peters, 386.

sion. It begins and ends with possession; for it is only upon property in the possession, and while it actually continues in the possession of such a creditor, that any such lien attaches. (e) If the possession be lost, or be suffered to remain ever so long unproductive it cannot be regained, or made beneficial by any judicial proceeding; because such a lien is only a mode of enforcing satisfaction by the mere passive holding of the creditor, and thus preventing the debtor from deriving any benefit from his own until he renders justice where it is due. It is a sort of *distringas* to which certain creditors may have recourse without the previous sanction of a court of justice. But the principles upon which this lien is founded, can afford no illustration or support to that claimed by this plaintiff.

The specific lien of a mortgage arises out of the express and special nature of the contract of mortgage itself; and, owing to its peculiar nature falls almost exclusively within the jurisdiction of a court of equity. But the doctrines in relation to this species of lien, it is evident, can have no bearing upon this case.

Under the civil and maritime law there are many instances of what is called privileged creditors, whose claims are allowed to operate as a lien upon certain property which has been erected, saved, or benefited by their labour. By a lien of this kind, the ship herself is bound to the material men by whom she has been repaired, to the seamen by whom she has been navigated on the high seas, &c. And such creditors may obtain the benefit of their lien by proceeding against the ship alone, without naming any person as defendant, or the holder. But however analogous this suit may appear to be to a proceeding *in rem* in the admiralty, the principles of the civil or maritime law, by which the lien of a privileged creditor is governed, can have no relation to this case.

The plaintiff alleges that he has an equitable lien upon the land held by this defendant, and seems to rest his claim to relief mainly upon that foundation. But an equitable lien is inseparably incident to a contract of purchase. It is a vendor's privilege and security, founded not upon any thing expressed in the contract of sale itself, nor on any legislative enactment or rule of the common law; but on the principles of equity which declare it to be unjust, that any such sale should be made absolute, in all respects, until the whole purchase money has been paid. An equitable lien can

(e) *Jacobs v. Latour*, 15 Com. Law Rep. 388.

only exist in a vendor as against a vendee, and those claiming under the vendee with notice. It may be waived or extinguished by a separate express agreement, or by an analogous express provision in the contract of sale itself; or by an implication arising from the acts of the vendor. And it can only be sustained and enforced in a court of equity. (*f*) Here, however, that sale upon which this plaintiff claims the benefit of an equitable lien was not made by himself; but under a judicial authority, and according to the very peculiar provisions of an act of Assembly regulating the whole subject; so that, as on a sale made under a decree of this court, the equitable lien, if any such lien arose, could only be held and enforced by the court under whose authority the sale was made, and not by this plaintiff. (*g*) But this plaintiff can have no lien of any description; nor obtain relief in any other mode than that given and prescribed by the act of Assembly under which the sale was made.

By several statutes lands have been made liable to be taken in execution and sold for the satisfaction of debts; and as a consequence of such liability, it has become a well established principle, that it gives to the creditor a lien which fastens from the date of the judgment upon all the lands which the debtor then has, or may thereafter acquire, so as to be liable to be taken in execution on such judgment. The principles upon which this judicial lien rest have, however, no analogy to that kind of lien on which this plaintiff relies.

By an act of Assembly it is declared, that all lands and tenements belonging to any public debtor, after the commencement of suit against him, shall be liable to execution in whosoever hands or possession they may be found. (*h*) This law gives the state a lien of a peculiar character which, it is evident, may, and, perhaps, can only, under any circumstances, be enforced at common law. (*i*) In England the king is allowed a similar lien upon the real estate of public debtors. (*j*) But this lien has been given for the benefit of the state alone; and therefore cannot be permitted, in any case, to be called into action to subserve the purposes of an individual who institutes a suit against any one who stands bound, as in this instance, only nominally as a public debtor, but in reality as liable

(*f*) *Mackreth v. Symmons*, 15 Ves. 330; *Iglehart v. Armiger*, 1 Bland, 519.—(*g*) *Iglehart v. Armiger*, 1 Bland, 527; *Andrews v. Scotton*, 2 Bland, 656.—(*h*) *March*, 1778, ch. 9, s. 6.—(*i*) *Davidson v. Clayland*, 1 H. & J. 546.—(*j*) *The United States v. Fisher*, 2 Cran. 358; *Jones v. Jones*, 1 Bland, 413.

upon a contract intended and allowed only to operate as a mere private security. (*k*)

There are several instances in which, by express legislative enactment, it is declared, that a bond given to the state shall be a lien, and bind the real estate of the obligors for the payment of the debt. In one of those enactments a special and summary course of proceeding is prescribed for obtaining judgment against the obligors. But nothing is said in any of them as to the mode in which the benefit of the lien is to be obtained where the obligor may have aliened his land after having given such a bond. Upon which it has been held that the lands upon which such a statutory lien had been fastened, might be taken in execution under a *fiery facias* in whosoever hands or possession they might be found. (*l*)

The lien of which alone this plaintiff can have any benefit whatever, either at law or in equity, is that, and only that which has been secured to him by the act to direct descents, as it was under that law the sale was made for the purpose of effecting a partition, upon which a share of the purchase money was awarded to this plaintiff with a bond and lien, given as prescribed to secure its payment. The positive provisions of the last general act to direct descents, as regards the matter under consideration, will be best understood by adverting to the previous enactments upon the same subject. As to which it will be proper to premise, that where a partition could not be made of the lands descended among the heirs, without loss or disadvantage, these acts of Assembly prescribed two modes of effecting a division of their value; first, that one of the heirs should be allowed to elect to take the whole at a valuation on his becoming bound to pay to each of the other heirs his due proportion; and secondly, if no one of the heirs would elect to take the whole upon those terms, that then the land should be sold, and the proceeds of sale divided among them. In both cases there is a sale, in the one to the heir electing to take, and in the other to a purchaser; and, therefore, there was a like propriety in both cases in having the payment of the purchase money well secured.

The matter under consideration is then as to the nature of the security given, according to the provisions of these laws, for the payment of the purchase money, where a sale has been made in

(*k*) *Ex parte* Usher, 1 Ball & Bat. 197.—(*l*) 1769, ch. 14, s. 12; 1773, ch. 26, s. 9; 1791, ch. 85, s. 9; 1792, ch. 38, s. 3; 1799, ch. 80, s. 5 and 17; 1802, ch. 100, s. 12; Lane v. Gover, 3 H. & McH. 394.

either of those modes for the purpose of effecting a division of the value of the land descended.

By the original act it was declared, that where one of the heirs elected to take at the valuation, the *value* should be a lien and incumbrance on such land until paid; and further, that the same might be recovered by an action upon the case brought by the parties respectively entitled. (*m*) Whereby a lien of a specified and peculiar character was given, nearly similar, it is true, to a vendor's equitable lien; but instead of pronouncing it to be a lien of that kind, or of sending the party to a court of equity to have it enforced; the mode of obtaining the benefit of it was expressly declared to be by an action at common law.

By some subsequent acts it was declared, that where any person entitled should elect to take the estate, or any part of it, at the valuation; or where it should be sold, the *bonds* taken for the payment of the purchase money should remain and be a lien on the land until they should be wholly paid. (*n*) By these provisions the circumstances which give a lien, in the case of a purchase by election were altered; and instead of the lien originating simply from an election to take at the valuation, as in the previous law, it was made to arise only from the *bonds* given as well on a purchase by election as at a sale. By another act it was declared, that it should not be necessary for an elector or purchaser to give bond to each one of the representatives of the intestate; but that one bond might be given to the state to secure to the heirs their respective proportions; (*o*) but this act was totally silent upon the subject of a lien.

In all cases, however, it would seem, that, as an additional security for the payment of the purchase money, the legal title was to be withheld until the whole amount was paid; for, it was declared that the legal title should not be conveyed to the purchaser until the terms of sale had been complied with by his having paid the purchase money. (*p*) And by another act it was declared, that the legal title should not be conveyed to him who elected to take until the valuation had been paid or *secured to be paid* to the heirs of the intestate. (*q*) Upon which it has been held, that, until the purchase money has been so paid or secured to be paid, the legal title does so absolutely remain in each one of the heirs, that he may

(*m*) 1786, ch. 45, s. 9.—(*n*) 1802, ch. 94, s. 5; 1809, ch. 160, s. 6.—(*o*) 1815, ch. 205.—(*p*) 1799, ch. 49, s. 3.—(*q*) 1802, ch. 94, s. 6.

maintain an action of ejectment, and recover in his own name the entire share of the legal estate which had descended to him, in like manner as if no attempt to effect a partition had been previously made. (r)

By the last general act to direct descents, under which these lands descended, and in pursuance of which the sale was made, and the bond given to the state, it is declared, that such bond shall be conditioned for the payment of the amount of the purchase money to the legal representatives of such intestate, in such proportion as each may be entitled to, agreeably to the order of the court; which *bond* shall be and remain a lien on the said real estate until the money intended to be secured thereby shall be wholly paid; and the said bond shall be recorded among the records of the county court from which the commission shall have issued; and in case the commission shall have issued from the Chancery Court, then the said bond to be recorded in the office of the Court of Appeals for the Western Shore; and upon such bond, or an office copy thereof, suit or suits may be instituted against the obligors therein, or any of them, for any breach of the condition thereof by any person interested therein. And the plea of *non est factum* shall not be received to any such suit unless the same be verified by the affidavit of the defendant tendering the same. (s)

Here then, and in this case, that lien from which alone this plaintiff can ask to have any benefit whatever is made to arise altogether and exclusively from the *bond*. It is blended and associated with that instrument, and is a specific lien which is as much parcel of the *bond* as is that of a specific lien of a mortgage. The existence of two liens at the same time, in favour of the same party, upon the same estate, and having the same object, are utterly inconsistent and incompatible with each other; and hence it has become well established, that the taking of a mortgage of the same estate to secure the payment of the purchase money waives or extinguishes the vendor's equitable lien. (t) So here this express lien, given by this act of Assembly as an incident of the bond, necessarily excludes and repudiates every thing like a mere equitable lien having the same object upon the same estate. And instead of the remedy upon this statutory lien being peculiarly and exclusively cognizable in a court of equity, as is that upon a pro-

(r) Jarrett v. Cooley, 6 H. & J. 253.—(s) 1820, ch. 191, s. 22.—(t) Mackreth v. Symmons, 15 Ves. 330; Iglehart v. Armiger, 1 Bland, 519.

per equitable lien, it is expressly declared, that it shall only be enforced by a suit at common law upon the bond itself. The lien security, and the remedy upon it, in this respect, are alike new and specially prescribed; neither the one nor the other is left to be ascertained by inference or analogy.

I am therefore of opinion, that no mere equitable lien can be presumed to arise from any sale of a real estate made under this law for the purpose of effecting a division of its value; and that this plaintiff can have no remedy whatever for recovering the amount of the purchase money due to him, other than that which has been specially prescribed by this act of Assembly, under which the sale has been made and the bond given.

Whether the first judgment which may have been obtained, as in this instance, upon a bond of this description, by any one of the heirs, for whose security it was given, so merges the whole bond as that no other suit can be brought upon it against the same obligors; or so as to leave to the other heirs no other mode of proceeding for the recovery of their respective shares than by a *scire facias* upon the judgment thus recovered, it is not necessary now to determine. But it is clear, that whether the bond has been taken under the direction of the Court of Chancery, or of a county court, or whatever may be the proper course of proceeding, the remedy must be at common law upon the bond itself, or upon that judgment by which the bond has been absorbed.

This last general act to direct descents declares, that the legal estate shall not be conveyed until the terms of sale shall have been complied with by the purchaser having paid the purchase money; and in relation to the estate held by the purchaser, it is said to be an equitable interest therein before any deed shall be executed for the estate sold. And again it is said, that the county court or Chancellor shall be satisfied, that the purchase money has been fully paid before a conveyance is ordered to be made. (*u*) Whence it is clear, that the lien, the remedy upon it, and its final disengagement by a conveyance are all expressly declared to arise out of, and to be attendant upon the *bond*; and to be chiefly or altogether a continuation or part of the judicial proceedings of that tribunal to which the application had been made for a partition of the estate. (*w*)

It is declared, that the *bond* shall remain as a *lien* until the

(*u*) 1820, ch. 191, s. 24 and 25.—(*w*) *Stuart v. Laird*, 1 Cran. 309.

money intended to be secured thereby shall be wholly paid. And therefore it would seem that this statutory lien, thus blended with such a bond, must be co-extensive with the whole interest of the heirs of the intestate. But it cannot be so in all cases.

Here it has been shewn, that *Reuben Ridgely*, one of the heirs, was the purchaser; and consequently, the bond which he gave, could not, as to himself, have been intended to secure more than the amount of the four shares belonging to the other heirs. The purchase by him, he being one of the heirs, gave him the same sort of undivided interest in the whole which another purchaser would have had, who had paid to him his share of the purchase money. But it appears, that *Amelia Ridgely*, another of the heirs, became bound by this bond as the surety of *Reuben Ridgely*. Whence it necessarily follows, that she thereby tacitly and totally waived and extinguished her lien; because, as regards her interest, no bond has been given to secure her share of the purchase money; and as no lien can arise but upon a bond given as a security to her; the lien which would otherwise have so arisen must be considered as having been suppressed by this, her own deliberate act, which repudiates the existence of any such lien. And, therefore, since she has thus precluded herself from any such lien upon the land, and has trusted entirely to the personal liability of her co-obligor *Reuben Ridgely*, the purchaser, it follows, that this *bond lien* extends no further than as a security for three out of five shares of the purchase money for which the land sold.

It appears, that *Ethelbert Iglehart*, another of the five heirs, brought suit upon this bond; and, on obtaining judgment, sued out a *fieri facias* which was levied on this land, and the whole of it sold by the sheriff to this defendant. This sale must have passed all the interest of *Reuben Ridgely*, whose property was ordered by the *fieri facias*, to be taken and sold to satisfy the debt due by him to *Ethelbert Iglehart*, for whose use the suit upon the bond was instituted; and that equitable interest of *Reuben Ridgely*, as has been shewn, amounted to two-fifths of the whole. But as *Ethelbert Iglehart* caused his execution to be levied upon the very same land which was bound by the *bond lien* as a security for the payment of his one-fifth of the purchase money, and caused the whole to be sold, he has so obtained satisfaction to the full extent of that lien, and thereby virtually extinguished it in favour of this defendant, the purchaser at the sheriff's sale. (x)

(x) *Jacobs v. Latour*, 15 Com. Law Rep. 388.

In the case of a recognizance, if the conusee purchases, or accepts a grant of the land bound by his recognizance, he thereby discharges his lien; (y) so here, this heir, by taking in execution and having sold the land bound to him thereby discharged his lien; since it would be against all law and equity to suffer him to retain his lien, so as in any manner thereby to obtain a satisfaction for what, as in this instance, might remain unpaid, from the very same fund; and that too, to the prejudice of third persons. But, as in the case of a statute merchant which, because of its being sealed by the conusor himself, may be treated as a mere personal obligation by the conusee, who may waive all benefit of the lien connected with it; (z) so here, although this *bond lien*, to the extent of the interest of *Ethelbert Iglehart*, has been exhausted and extinguished by the levy and sale under his execution; yet that cannot prevent him from pursuing his remedies upon the personal obligation against the obligors until he has obtained full satisfaction.

I am therefore of opinion, that this defendant has obtained, by his purchase from the sheriff, an interest to the extent of three-fifths of the whole of the estate, unencumbered by any lien whatever in favour of the three heirs whose interests were covered by the execution in the manner described.

But as regards the interests of this plaintiff, it is evident, that no act which has been or could be done by his co-heir *Ethelbert Iglehart*, by the institution of a suit upon the bond, or by causing the land to be sold under execution or otherwise, can be permitted, in any respect, to prejudice the rights, or to impair the obligation and lien belonging to this plaintiff. His remedies or forms of proceeding may have been, in some particulars, varied; but the substance of them cannot have been affected in any manner whatever by any proceeding or conduct of his co-heirs alone. And those remedies whether upon the bond and lien, or upon the judgment and lien; because of the bond having been transformed into a matter of record by the judgment, (a) it is most manifest must be by a proceeding at the common law as prescribed by the act to direct descents; since there can be no equitable lien of any description which can be dealt with by this court.

It is unnecessary to say any thing as to the want of proper parties, which has been set down among others of the causes of this

(y) Bac. Abr. tit. Execution, B. 5.—(z) Bac. Abr. tit. Execution, B. 2.—(a) Higgen's case, 6 Co. 45.

demurrer; because if there were no other or more substantial objections to this bill, the case would be ordered to stand over with leave to amend and make proper parties; but as the other objections go to the substance and merits of the complaint, the case must be now finally decided.

Whereupon it is *Decreed*, that the plaintiff's bill of complaint be and the same is hereby dismissed with costs, to be taxed by the register.

See this case as disposed of by the Court of Appeals, 6 G. & J. 49.

NEALE v. HAGTHROP.

On a bill for relief, discovery, and account, the right of the plaintiff must be first decided; after which an account may be taken; and if the relief required be the sale or delivery of a thing with its rents and profits during the time of its unjust detention, the delivery or sale should be first ordered, and then an account up to the time of such sale or delivery.

An administrator *de bonis non* can recover only such assets as have not been converted or distributed by his predecessor.—Although the next of kin of an intestate have a vested interest in the surplus of his personal estate, they can only make title, or recover from or through an administrator.—Statements in the bill or answer as to agreements with persons not parties to the suit, the nature and validity of which agreements are not drawn in question; and all careless verbiage may be rejected as mere surplusage.

The answer of a defendant is taken for true so far as it is responsive to the bill, unless disproved.—Its allegations of fact not responsive, but in avoidance must be proved.—If a defendant submits to answer at all, he must answer fully and particularly.—Any material allegation left unanswered may, at the hearing, be taken for true.—Where a defendant declares, that he is entirely ignorant of the matters stated in the bill and leaves the defendant to make out his case, or in words to that effect, and the plaintiff replies, the allegations of the bill are thus put in issue and must be proved.

A deed by which a father conveyed all his personal estate to his son, upon condition, that the son should pay certain specified debts due by the father, *Held* to give rise to a resulting trust in favour of the father, so as to require the son to shew, that the specified debts of the father had been paid; and to give the representative of the father a right to relief and an account.

A purchaser for a valuable consideration without notice will not be disturbed.—What is notice?—Where a bill prays relief against several on the ground, that the deed under which they all claim is fraudulent, and one dies, the suit abates as to all.

THIS bill was filed on the 15th of December, 1820, by *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased, against *Edward Hagthrop* and *Barbara* his wife, administratrix of

John Hook, deceased, *William McMechen*, *John Cator*, *John S. King*, *John Weaver*, *Samuel Moore*, *George A. Hughes*, *John Fitzgerald*, *Catharine Rawlings* and *Benjamin Rawlings*, executors of *William Rawlings*, *Matthew Bennett* and *Nathaniel Chittenden*.

The bill states, that the plaintiff, on the 5th of April, 1820, took out letters of administration *de bonis non* upon the estate of the late *Anthony Hook*, which had been left unadministered by *Mary Hook*, deceased, the former administratrix; and that the intestate *Anthony Hook* being the owner, and in possession in his life-time of certain chattels real, and personal property, conveyed the whole to his son *John Hook*, by the following indenture:

‘This indenture, made the seventeenth day of August, in the year of our Lord seventeen hundred and ninety-seven, between *Anthony Hook*, of Baltimore county in the state of Maryland, brickmaker, of the one part, and *John Hook*, son of the said *Anthony*, of the county and state aforesaid, of the other part. Whereas, the said *Anthony Hook* is justly and *bona fide* indebted to *John Moale*, Esquire, of Baltimore city in the county aforesaid, for arrears of rent; to *Colonel Robinson* and *George Gray*, of Anne Arundel county; *Abel Cheney*, of Anne Arundel county; *John Kirwan*, of Snowhill, on the Eastern Shore of Maryland; *Milburn*, of Snowhill; *Littleton Furnis*, of Snowhill; *John Rean*, of Snowhill aforesaid; also to *Sarah Smith*, widow, of Baltimore county; *Joshua Amos*, of Baltimore county aforesaid; *Joshua Hendrickson*; *Valentine Sneider*; *William Hodge*; and *Margaret Croxall*, of Baltimore county, in several sums of money; and whereas the said *John Hook*, his son, hath agreed to pay the several creditors of his said father *Anthony*, their several and respective debts. Now, therefore, this indenture witnesseth, that the said *Anthony Hook*, as well in consideration of the above recited premises, as also for and in consideration of the natural love and affection he hath and beareth towards his said son *John Hook*; and the further consideration of the sum of five shillings, current money of Maryland, to him in hand paid by the said *John Hook*, the receipt whereof is hereby acknowledged, he the said *Anthony Hook* hath given, granted, bargained and sold, assigned, transferred and set over; and by these presents doth give, grant, bargain and sell, assign, transfer and set over unto him, the said *John Hook*, his executors, administrators and assigns, all those ten acres of land, being part of a tract of land called *David’s Fancy*, lying in Baltimore county; beginning, for the said ten acres, at a post set up at or near

unto the branch called, in the certificate for said land, Howard's Branch, and running thence north eighty-three degrees, thirty minutes east to a post set up on the west side of the main road leading from Baltimore town to the ferry point of Patapsco, and thence running with and bounding on the west side of the road aforesaid thirty-four perches; thence south eighty-three degrees, thirty minutes west to Howard's Branch, thence running with and bounding on said Branch to the place of beginning; containing within its metes and bounds ten acres of land, being the same which was leased by a certain *Richard Moale* to the said *Anthony Hook*, by indenture bearing date on or about the fifth day of January in the year of our Lord one thousand seven hundred and seventy-five, for the term of ninety-nine years renewable forever, subject to the rent and covenants in said lease reserved and contained; also all that lot or parcel of ground, being part of the lots mentioned in the original lease from *William Fell* to *John Hall*, situate on Fell's Point, Baltimore town and county, which was assigned by said *John Hall* to the said *Anthony Hook*, by indenture bearing date the eighth day of May, seventeen hundred and seventy-seven, and recorded among the records of Baltimore County Court, in *Liber W. G. No. 3, Z, fol. 667, &c.* which is contained within the following description, viz: Beginning at the distance of one hundred feet from the corner of Bond street and Alice-Anna street, and running and bounding on Alice-Anna street east forty-five feet, and thence north one hundred and thirty-seven feet, thence west forty-five feet, and thence to the beginning; subject to the rents and covenants in said assignment contained, together with all and singular the buildings and improvements on the above described parcels of land being, and every the privileges, advantages, and appurtenances to the same belonging, or in any wise appertaining; and also all the estate, right, interest, term of years to come, claim, property, and demand, whatsoever of him, the said *Anthony Hook*, both in law and equity, of, in and to every part and parcel thereof; and this indenture further witnesseth, that the said *Anthony Hook*, for the considerations aforesaid, hath bargained, sold and delivered; and by these presents doth bargain, sell and deliver unto the said *John Hook*, his executors, administrators, and assigns, three feather beds complete, two chests of drawers, six walnut chairs, six mahogany arm-chairs, six poplar arm-chairs, one negro named *Harry*, one female ditto named *Priscilla*, and her two children, one named *Lucy*, and one named *Jack*; one clock and case,

one-half-dozen table and half-a-dozen tea-spoons, all of silver; three cooking pots and three hangers; To Have and to Hold all and singular the lands and premises herein before mentioned with their, and every of their appurtenances, unto him, the said *John Hook*, his executors, administrators and assigns, in manner following, that is to say: To Have and to Hold the said ten acre lot, and the other lot on Alice-Anna street for and during all the rest, residue and remainder of the original terms granted for each respectively; subject to the rents and covenants reserved and contained in the above, in part, recited lease and assignment; and To Have and to Hold all and singular the household and kitchen furniture, plate, and negroes, unto him the said *John Hook*, his executors, administrators and assigns, forever. *Provided always*, and it is the true intent and meaning of these presents, and of the said parties hereto, that if the said *John Hook*, his executors, administrators or assigns, shall absolutely omit, neglect and refuse to pay the said recited creditors of the said *Anthony Hook* their several and respective just debts and demands against the said *Anthony Hook*, then this indenture, and every matter, clause, and thing, herein contained, shall cease, determine, and be utterly null and void to all intents and purposes whatsoever, any thing herein contained to the contrary thereof in any wise notwithstanding.'

The bill further states, that in June, 1798, *Anthony Hook* died intestate leaving five children, *John Hook*, who took out letters of administration upon his estate, *Margaret Knight*, *Catherine Orbin*, *Barbara Morrow* and *Ann Barbine*, who were all then living, and were 'the remaining heirs at law of the said *Anthony Hook*;' that in the month of September, 1800, *John Hook* died intestate, and letters of administration upon his estate were granted to his widow, the defendant *Barbara*, who, in the inventory of her intestate's estate, returned, as a part of it, the property mentioned in the deed of the 17th of August; and in the year 1801, she sold the whole of the ten acre lot at auction; and either herself bought, or caused to be purchased for herself; and afterwards held the same accordingly; that shortly after the sale the defendant *Barbara* intermarried with the defendant *Edward Hagthorp*; and they, on the 12th of February, 1802, rendered their first administration account to the Orphans Court, in which they charged themselves with no more than the sum of \$3,342 14, the aggregate valuation of the inventory; when, in truth, the sales of the ten acre lot alone amounted to \$5,275; that afterwards, on the 21st of February,

1807, the defendants *Hagthrop* and wife, as administratrix, by their petition to the Orphans Court, referring to the before mentioned deed, set forth, that after she had returned the property therein mentioned as part of the personal estate of her intestate *John Hook*, it was discovered, that it was held only in trust by him for the purpose of reimbursing himself certain sums of money which he had paid on account of his father *Anthony*; and afterwards to hold the same for the use of the said *Anthony*, and his legal representatives; that, on making this discovery, it was agreed among the representatives of *Anthony* and the petitioners, that it should be sold and the proceeds thereof distributed according to law; that a sale was made accordingly; and that the petitioners were then ready to account for the sum of money paid by *John Hook*, in his life-time, for *Anthony Hook*; and also for the distributive share of the residue of the proceeds of sale arising due to *John Hook* as one of the children of *Anthony Hook*; and, for this purpose the petitioners prayed, that the property thus erroneously returned in the inventory of *John Hook's* estate might be stricken therefrom, and the petitioners credited accordingly. Upon which the Orphans Court adjudged and ordered, that the property should be stricken out of the inventory and the petitioners credited as prayed.

The bill further states, that the whole of the property mentioned in said deed of trust, after the death of *Anthony Hook*, was wrongfully held and retained by *John Hook*; and after his death was illegally, wrongfully, and fraudulently administered upon, as his property and estate, by the defendants *Hagthrop* and wife; and for the purpose, and with the intent of defrauding the other heirs of *Anthony Hook* out of their legal portions thereof; that the defendants *Hogthrop* and wife, have never accounted for any part of the said property; that they had conveyed a part of the ten acre lot to the defendant *McMechen*, and a part of the piece of land at Fells Point to the defendant *Bennett*; and that the other defendants then held portions of the property mentioned in the deed of the 17th of August, by leases, or other conveyances derived from the defendants *Hagthrop* and wife and the defendant *McMechen*.

Whereupon the bill prayed, that the defendants might be compelled to account for the whole of the property which passed into the hands of the said *John Hook*, and which is mentioned and described in said deed of trust, together with the profits which have arisen therefrom since the same has been in their possession; excepting such part thereof as they are entitled by law to retain in

right of the said *John Hook*, as one of the *heirs at law* of the said *Anthony Hook*; and that the plaintiff may have such other and further relief in the premises as the nature of the case may require, &c.

To this bill the defendants *McMechen*, *Cator*, *Moore* and *Hughes*, put in their answers on the 10th of July, 1821.

McMechen answered separately, which he styles his answer, 'to the bill of complaint of *James Neale* and others representatives of *Anthony Hook*, deceased;' and says that by a deed, bearing date on the 9th of September, 1803, the defendants *Hagthorp* and wife, in consideration of \$400, conveyed to him four acres or thereabouts of the ten acre lot; which deed, exhibited with and made a part of his answer, after referring to the lease from *Richard Moale* to *Anthony Hook*, says, 'and whereas the said *Anthony Hook* did afterwards, by his deed of assignment duly executed, acknowledged and recorded among the land records of Baltimore County Court, for the consideration mentioned, assign, transfer, and set over unto the aforesaid *John Hook*, his executors, administrators and assigns, all and singular the aforesaid piece of ground and premises. And whereas the said *John Hook* has since departed this life and the said *Barbara* hath obtained letters of administration on his estate, and since then intermarried with the aforesaid *Edward Hagthorp*;' that under this deed he took possession of the land so conveyed, and rented it as a brick-yard for several years, and paid the taxes up to the year 1819, 'and during all which time several of the said complainants resided in the neighbourhood of said land, well knowing that this defendant had so become the purchaser of the said land.' That he advertised the land to be leased at public sale, at which sale the defendants *Moore*, *Hughes* and *Cator*, became purchasers of leases; 'that the said sale was in the neighbourhood of the said complainants or some of them, and on the premises.' That he, this defendant, has paid the paving taxes amounting to about \$480; and 'this defendant saith, that the said purchase of the said lands, by this defendant, from the administrator aforesaid, was *bona fide*, and without notice of any claim or claims on the said land by the said complainants or any of them.'

The defendant *Cator* also styles his response his separate answer 'to the bill of complaint of *James Neale* and others representatives of *Anthony Hook*, deceased;' and says, that he purchased at a public auction some time in the month of April, or May, 1818, of the defendant *McMechen*, a lease of ninety-nine years renewable

for ever of a part of the premises mentioned in the bill; that 'the complainants or some of them, long before and since the auction aforesaid, lived near the premises mentioned in their bill;' that he with others applied and had the street paved on which the lot leased to him fronted; and that at the time he accepted the lease from the defendant *McMechen*, as also at the time he applied for the paving of the street, he had no knowledge that the complainants claimed title to the premises.

The defendants *Moore* and *Hughes* also say, that theirs is their joint and separate answer 'to the bill of complaint of *James Neale* and others representatives of *Anthony Hook*, deceased;' and that at a public sale in the month of April, or May, 1818, they severally purchased leases of the defendant *McMechen*, of part of the land mentioned in the bill; that they have ever since paid rent; 'and defendants swear positively, that they nor either of them had any knowledge of any claim or claims of the said complainants upon, in, and unto the said lands at the time of their purchase and lease aforesaid.'

The defendants *Hagthorp* and wife, on the 11th of December, 1821, put in their joint and separate answer, in which they say, that on the 8th of May, 1797, *Anthony Hook*, for a valuable consideration by indenture, conveyed the lot of ground on Alice-Anna street to *John Hook*; that the said *Anthony Hook* being much involved in debt, and advanced in years, and deriving his support principally from his son *John Hook*, executed to him the deed of the 17th of August, 1797, whereby he conveyed to *John* the property therein mentioned, who accordingly paid the debts particularly mentioned therein as these defendants believe and charge; and that the said *John Hook* paid the said sums of money set out in the said assignment, so far as the creditors applied for payment of the same; that *Anthony Hook* died intestate some time in June, 1798, and that *John Hook* obtained letters of administration on his estate; that *John Hook* died intestate in September, 1800, leaving this defendant *Barbara* his widow, and one child, *James Hook*; that this defendant *Barbara*, obtained letters of administration on her husband's estate; and in the inventory returned the chattels real mentioned in the deed of the 17th of August, as a part of the property of her intestate; that some time after she had made return in the inventory of the said property, the children and heirs of *Anthony Hook* applied to her for their proportion of it, alleging that it had been conveyed to and held in trust by her intestate, and

ought to be accounted for as a part of the estate of *Anthony Hook*; that after advising with counsel she agreed, that the ten acre lot should be sold so as to effect a distribution thereof among the heirs and representatives of *Anthony Hook*, which was made accordingly; that several years after those transactions, and after her marriage with the defendant *Edward*, she and her husband preferred the petition, as stated in the bill, in which they deemed it proper to present to the view of the Orphans Court the said paper upon which the said children and heirs of the said *Anthony Hook* had relied to prove, that the said property did not belong to the said *John Hook* as his absolute property, but was only held by him in trust for the said *Anthony* and his representatives; and which was accordingly received by the said court, and the final account of the said administration of the said estate of *John Hook*, was passed and closed.

The defendant *Bennett*, by his answer filed on the 14th of February, 1822, says, that the defendants *Hagthrop* and wife for a valuable consideration, to them actually paid, did by indenture, made on the 3d of August, 1810, convey to him a part of the ten acre lot as therein described; 'that he had no knowledge or notice of any claim of the said complainant, or of the heirs and representatives of the said *Anthony Hook*, deceased, either before or at the time of the said conveyance of the said property mentioned in the said indenture, of, in and to the said property therein mentioned; nor had this defendant any knowledge or notice of the said claim set forth in the said bill of complaint, until since the filing and exhibition of the said bill of complaint.'

The defendant *Fitzgerald* put in his answer on the 14th of February, 1822, in which he says, that on the 4th of September, 1806, he purchased one piece of the ten acre lot of *John H. Hill*; and on the 9th of August, 1810, he purchased another piece of the defendant *Edward Hagthrop*; and on the 17th of September, 1811, he purchased a third piece of *Girard Tipton*; and on the 17th of June, 1815, he purchased a fourth piece of the defendant *Edward Hagthrop*; that the deeds made to him for these four pieces of ground were *bona fide*, for a valuable consideration, and without any notice of any claim being made thereto by this plaintiff, or the heirs of *Anthony Hook*, deceased, until the filing of this bill.

The defendant *Benjamin Rawlings*, as surviving executor of *William Rawlings*, deceased, put in his answer, on the 10th of May, 1822, in which he admits, that he is one of the tenants in

possession of a part of the premises mentioned in the bill of complaint; and says, that his testator purchased of a certain *Samuel Young* and *Francis Young*, on the 10th of September, 1804, for a valuable consideration, and without notice of any claim of the said complainant or the heirs of the said *Anthony Hook*.

On the 19th of July, 1822, the defendant *King* put in his answer, in which he says, that he, on the 29th of March, 1819, took a lease from *John Cator* for a lot of ground fronting on Goodman street thirty feet; and that he is ignorant of, and entirely unacquainted with any of the matters or things set forth in the bill of complaint.

The defendant *Chittenden* put in his answer, on the 26th of November, 1822, which, it was agreed by the plaintiff, should be received without oath, in which he says, that he held the possession of a lot of ground on Alice-Anna street, which *John Hook*, as administrator of *Anthony Hook*, had sold and conveyed to *Patrick Bennett*, from whom it was passed by several mesne conveyances to this defendant, all of which conveyances he is ready to produce and prove as this court shall direct; that this defendant, and those under whom he claims are *bona fide* purchasers for a valuable consideration, without notice of any claim of the plaintiff or the heirs and representatives of the said *Anthony Hook*.

The defendant *Weaver*, on the 16th of January, 1823, put in his answer, which was also, with the consent of the plaintiff, received without oath, in which he says, that in the year 1819, he obtained a lease of a part of the ten acre lot from the defendant *McMechen*; and that he is a *bona fide* purchaser for a valuable consideration, and without notice of any claim of the plaintiff or of the heirs and representatives of *Anthony Hook*, deceased.

On the 7th of February, 1823, on the petition of the plaintiff, leave was granted so to amend the bill as to make *James Hook* a defendant, who on the same day put in his answer, which he styles his separate answer 'to the amended bill of complaint of *James Neale*,' &c.; and says that he is the only child and heir at law of *John Hook*; but as to all the other matters set forth in the bill he is ignorant, and therefore leaves the plaintiff to prove the same.

After which, on the 28th of July, 1824, the plaintiff, with the leave of the court, filed a supplemental bill; the only material difference between which and the original bill is, that the supplemental bill, as it is called, says, 'that the said *Anthony Hook* left, at his death, four children; the said *John Hook*, who administered upon

his estate, and into whose hands and possession the same passed, by virtue of the said administration, since deceased, leaving one child, *James Hook*, one of the defendants to this bill; and three daughters, *Margaret Knight*, *Catherine Ordin* and *Barbara Morrow*; and one grandchild, *Anne Barbine*, wife of *Charles Barbine*, who is the only child and heir at law of *Joseph Hook*, deceased, son of the said *Anthony Hook*.' But this bill prays process only against those who were defendants to the original bill; it does not ask for a *subpœna* against *James Hook*. It was, however, agreed, that the answers which had been previously filed, and 'since amended, should be taken as answers to the said amended bill.'

A commission was issued to take testimony, under which the depositions of several witnesses were taken; and several deeds and instruments were returned with the commission.

From all which it appears, that during the last illness of *Anthony Hook*, he was visited by the late Catholic Bishop *Carroll*, who having been told that there had been some misunderstanding between him and his son *John*, respecting a conveyance of his property, the Bishop caused a bond to be prepared expressive of the fact, to be signed as a stipulation and acknowledgment by *John*, that the deed of the 17th of August, had been made in trust for the payment of *Anthony's* debts, and nothing more; which instrument *John*, on some account, not now known, refused to execute; that *Anthony* died soon after, and *John* administered upon his estate; and after *John's* death, which happened in September, 1800, letters of administration *de bonis non* of the personal estate of *Anthony* were, on the 8th of November, 1800, granted to his widow *Mary Hook*; after which she applied, by petition, to the Orphans Court to compel *Barbara*, the administratrix of *John*, to execute the trust specified in the deed of the 17th of August; to which petition *Barbara* demurred; because the matter belonged properly and exclusively to the Court of Chancery; and the Orphans Court sustained the demurrer.

That afterwards the sale of the ten acre lot was agreed upon and made; and the defendants *Hagthrop* and wife, by an indenture bearing date on the 29th of May, 1804, conveyed a part of it to *Mary Hook*, in discharge and satisfaction of the thirds of the said *Mary*, of, and in the estate of the said *Anthony Hook*, her late husband; whereupon *Mary*, on the same day, by an instrument of writing under seal, acknowledged the receipt of £429 19s. 10d., being the full amount of her dower, thirds and proportion of the

estate of every description of her late husband; and ratified, so far as it respected her dower or thirds, the sales made by *Hagthrop* and wife as administratrix, or either of them. Which part of the ten acre lot was afterwards conveyed by *Mary Hook* to *Samuel Young* and *Francis Young*, and by them conveyed to *William Rawlings*, the testator of the defendant *Benjamin Rawlings*, which several conveyances referred to the deed of the 17th of August.

That *Catherine Orbin*, a daughter of *Anthony Hook*, on the first of January, 1805, executed a deed under seal to *Hagthrop* and wife as administratrix of *John Hook*, whereby she acknowledged the receipt of £121 0s. 0d. current money as the full amount of her proportion of her father's estate, and ratified, so far as it respected her part, the sales made by them. That the defendants *Hagthrop* and wife as administratrix of *John Hook*, at several times sold merchandise to a considerable amount to two other of the children of *Anthony Hook*, for which they gave receipts, as for so much to be deducted out of their respective distributive shares of their father's estate. And that *Mary Hook*, the widow and administratrix *de bonis non* of *Anthony Hook*, died sometime in the year 1805, after which administration was granted, as stated in the bill, to this plaintiff.

After the case had been set for hearing, the solicitors of the parties by a writing, filed on the 4th of November, 1826, agreed, that the bill be so amended as that the prayer for *subpœna* should include the name of *James Hook*.

5th December, 1826.—BLAND, Chancellor.—This case standing ready for hearing, and the counsel on both sides having been fully heard, the proceedings were read and considered.

It will be proper to recollect as we proceed with the exposition of this case, that this is a bill professedly for relief against these defendants, as the alleged unjust holders of certain specified assets of the plaintiff's intestate; and that therefore, if the plaintiff is entitled to relief of any kind, according to the nature of his case, he is, as a consequence of such right, entitled to an account from the defendants, of the rents and profits of the property so wrongfully held by them, and to a discovery from each as to all matters in relation to such an account. The plaintiff's title to relief is obviously and necessarily the first and preliminary question to be decided; for it would be idle to go into any account of rents and profits, or to ask for or to consider any discovery so made, if the plaintiff is not entitled to relief in some one form or other, accord-

ing to the nature of his case; since no case can be sent to the auditor with directions to state an account in any way, unless it be first shewn, that the plaintiff is entitled to relief; nor can an account or discovery be directed in any case but as ancillary to a previously ascertained or admitted right to relief. So that, if upon a demurrer, plea, or answer, before or at the final hearing it should be determined, that the plaintiff can have no relief, he can have no account, nor any discovery; and although the taking of the account may not be stayed pending an appeal from the adjudication in favour of the plaintiff's title. (a)

I shall therefore in the first place, endeavour to obtain a clear view of the plaintiff's case; and thereupon consider and determine the nature of the relief to which he is entitled; and then give directions as to the accounts necessary to be taken for the purpose of ascertaining the extent of that relief.

According to the law of England, an administrator *de bonis non* cannot call the representatives of the previous deceased administrator of his testator to account for any property of the intestate, that such predecessor may have converted or wasted. Nor can he claim or recover any thing but those goods, chattels, and credits of his intestate, which remain in specie and are capable of being clearly and distinctly designated and distinguished as the property of his intestate. (b) An executor or administrator, who is here considered as a trustee for the creditors, legatees, and next of kin, is expected and required to preserve the property of the deceased apart from his own, and to give it, as it were, an ear-mark, that it may be known and readily traced to any one into whose hands it may happen to fall. And if he does so, the court will do every thing that can be done to protect and assist him. (c)

According to our Provincial testamentary system, an administrator *de bonis non* might, under certain circumstances, have had

(a) *Popham v. Bampffield*, 1 Vern. 83, 344; *Welford v. Leddel*, 2 Ves. 400; *Fitzgerald v. Burk*, 2 Atk. 397; *Jeffreys v. Baldwin*, Amb. 164; *Fry v. Penn*, 2 Bro. C. C. 280; *Jacobs v. Foodman*, 2 Cox, 282; *Lee v. Alston*, 1 Ves., jun., 82; *Milbourn v. Fisher*, 5 Ves. 685, note; *Sutton v. Scarborough*, 9 Ves. 75; *Baker v. Mellish*, 10 Ves. 553; *Corporation of Carlisle v. Wilson*, 13 Ves. 276; *Rowe v. Teed*, 15 Ves. 377; *Drew v. Drew*, 2 Ves. & B. 161; *Jones v. Jones*, 3 Meri. 163; *Williams v. Steward*, 3 Meri. 502; *Attorney-General v. Brown*, 1 Swan. 294; *Holloway v. Millard*, 1 Mad. Rep. 421; *Lorimer v. Lorimer*, 5 Mad. 363; *Sanders v. King*, 6 Mad. 63; *Mendizabel v. Machado*, 2 Cond. Cha. Rep. 40; *Moses v. Lewis*, 5 Exch. Rep. 388; *Mellish v. Richardson*, 5 Exch. Rep. 404; *Townshend v. Duncan*, 2 Bland, 49.—(b) *Bac. Abr. tit. Executors and Administrators*, B. 2.—(c) *Waukford v. Wankford*, 1 Salk. 306; *Freeman v. Fairlie*, 3 Merv. 39.

his predecessor cited before the commissary and compelled to account. (d) But at present, the remedy against an administrator or his representatives, for any waste or misapplication of the effects of the deceased, is by an action at law upon his administration bond by any one interested. For it is expressly declared, that the authority conferred by letters of administration *de bonis non*, shall be to administer all things described in the acts as assets not converted into money and not distributed, or delivered, or retained by the former executor or administrator, under the direction of the Orphans Court. (e)

Hence this plaintiff is incompetent to demand, in the representative character in which he sues, any thing but those goods, chattels, and credits, which his letters authorize him to administer; that is, the chattels real and personal property of his intestate, which may be now shewn to remain undisposed of by either of the previous administrators, *John* or *Mary*; or which have been and continue to be held unaccounted for by any one as trustee or agent of the late *Anthony Hook*, his intestate. The statements and allegations of these original and amended bills must, therefore, be taken subject to the limited rights of the representative character of this plaintiff.

It appears that some of the next of kin of the late *Anthony Hook*, under an impression, that the chattels real of the deceased, had vested absolutely in them, have disposed of, or attempted to make a final disposition of the whole, as if such chattels real had been immediately cast into their hands by the mere operation of law, in like manner as the real estate of an intestate is at once cast upon his heirs. If these next of kin acquired, at once, by the act of the law alone, a legal right to these chattels real, by virtue of which they might, either concurrently with or independently of the administrator, dispose of them; then, as the joint or independent holders of the property in controversy, they ought to have been made parties to this suit. And, if they have acquired such a legal right, and have actually disposed of these chattels, then, it is no less evident, that all claim against these defendants is, so far, entirely at an end. In these points of view the allegations of the bill, in relation to these next of kin of the intestate, present some important preliminary inquiries.

(d) 1715, ch. 39, s. 3; Dep. Com. Gu. 55, 57.—(e) 1793, ch. 101, sub ch. 14, s. 2; 1820, ch. 174, s. 3; *Wankford v. Wankford*, 1 Salk. 306; *Sibley v. Williams*, 3 G. & J. 52.

The real estate of an intestate devolves at once and entirely upon his heirs by the mere operation of law. But his personal property is, by the law itself, cast upon no one; nor does the legal ownership of it vest immediately in any person. Such a legal title can only vest in an administrator, who alone is considered as the legal representative of the intestate as to his chattels real and personal estate. In the interval between the death of the intestate and the granting of administration, the legal right to the personal property is in the keeping of the law. During that interval there is no one who can sue or be sued for it; so that a person who had, after the death of the intestate, obtained possession of his personal property, could not have it quieted or matured into a right by the lapse of any length of time, even as much as forty years uninterrupted possession, before the granting of letters of administration; because, the statute of limitations could not be allowed to operate at all until the legal title was vested in some one; and there was a person lawfully clothed with a capacity to sue for, hold and dispose of such property. (*f*)

Our statute of distributions, like that of England, (*g*) directs the goods, chattels, and credits of those who die intestate, to be committed to an administrator whose powers and duties are prescribed. He has a vested interest in the personal estate of the deceased, (*h*) and is directed to collect and take the whole of it into his possession; which, or the proceeds of the sales thereof, he is, in the first place, to apply to the satisfaction of all the debts due from the intestate; and then, he is to distribute the surplus among the next of kin of the deceased. Although the creditors of the deceased are to be first provided for under this statute, yet the next of kin, among whom the surplus is to be distributed, take an interest which vests in them, by operation of law immediately. It is considered as a species of *chose in action* of an indefinite value; in nature of a present debt, payable at a future day. (*i*) This interest vests in those who are the next of kin of the deceased at the time of his death; not, however, in exclusion of a posthumous

(*f*) Stanford's case, Cro. Jac. 61; Jolliffe v. Pitt, 2 Vern. 695; Cary v. Stephenson, 2 Salk. 421; Murray v. The East India Company, 7 Com. Law Rep. 67; Fishwick v. Sewell, 4 H. & J. 394; Haslett v. Glenn, 7 H. & J. 17.—(*g*) Bac. Abr. tit. Executors and Administrators, I.—(*h*) Blackborough v. Davis, 1 P. Will. 42.—(*i*) Browne v. Shore, 1 Show. 2 and 25; Palmer v. Allicock, 2 Show. 407; S. C. 3 Mod. 59; Squib v. Wyn, 1 P. Will. 380; Palmer v. Garrard, Prece. Chan. 21; Doran v. Simpson, 4 Ves. 665.

child, who is regarded as a then living, though unborn distributee. And therefore, should a distributee die before the distribution of the surplus is actually made, his share will not sink into the estate of the intestate; but go to his own legal representatives in like manner as his other personal property. (j)

Hence it is clear, that, in no case can a next of kin make title to a distributive share otherwise than through an administrator; who, in equity, is regarded as a trustee for the creditors and next of kin; and as such may, in Chancery, be called to account by all or any of them. (k) And every one who takes possession of the personal property of an intestate, after his decease, may be sued at law or in equity by a creditor as an executor *de son tort*, and charged accordingly. (l) And, in equity, he will be considered as a trustee, and held accountable to the administrator, no matter how long he may have had possession before the administration was granted. (m)

It has been declared, that many widows or others, having the deceased's effects in their hands, and right to the administration thereof, designedly suffer other persons to administer, whose mouths are easily stopped with part of the estate's being delivered them, and bring only such part of the appraisement, to the great dishonour of the deceased, and deceit of the living; for prevention whereof as well as of frequent tedious suits for the detecting such concealments, it was enacted, that the court might in a summary way, cite such persons before it and examine and decide on the matter. (n) Here the distributees having a right to the administration are specially designated, and it is expressly declared, that they shall not retain or hold any of the personal estate of the deceased; and if they do conceal any of it, they are made liable in a summary way, as wrong-doers.

If the law were otherwise; and if each creditor and every one next of kin were allowed to help himself to what he thought his due; to seize upon and in any manner by his own act alone acquire a legal right to the personal property of an intestate, the greatest confusion would ensue, and the most monstrous frauds might be perpetrated. No letters of administration would be taken out in any case; but, on the death of every one who had left any

(j) Dep. Com. Gu. 114; *Edwards v. Freeman*, 2 P. Will. 446; 1793, ch. 101, sub ch. 11, s. 14.—(k) *Elibank v. Montolieu*, 5 Ves. 742; *Conway v. Green*, 1 H. & J. 151.—(l) *Webster v. Webster*, 10 Ves. 93.—(m) *Boteler v. Allington*, 3 Atk. 459; *Fishwick v. Sewell*, 4 H. & J. 394.—(n) 1719, ch. 14, s. 7.

personal estate, worth contending for, a disorderly scramble would take place; and those resident at a distance, infants, and all others who were unable to take care of their own interests, would be openly and wantonly defrauded, 'to the great dishonour of the dead and deceit of the living.' Such a course could not be tolerated in any shape, or for an instant. (o)

Hence the indispensable necessity, in all cases, of a regular administration; and of compelling all, as well creditors as next of kin, to resort, for the payment of their claims and distributive portions, to an administrator. It is not pretended, that these next of kin of *Anthony Hook* obtained any thing, any right whatever from his administrators. Consequently, having derived no right from either of the administrators; and none having been cast upon them by mere operation of law, they never had the power, in any manner, legally to dispose of any of the personal estate of the deceased, or to do any act which could at all affect the right of the present plaintiff.

Leave was asked and obtained, on the 7th of February, 1823, to make *James Hook*, the son of the late *John Hook*, a defendant; who on the same day filed his answer to the amended bill. And in a kind of amended or duplicate bill, filed on the 23d of July, 1824, *James Hook* is once incidentally spoken of as a defendant; no process was ever prayed against him by either bill; but by an agreement, filed on the 4th of November, 1826, he is admitted to be a party defendant. This person is no otherwise noticed in the proceedings. No charge whatever has been made against him; nor does it appear, that he can in any degree be made liable for any part of the subject in controversy, either in his individual capacity or as heir or next of kin of his father the late *John Hook*, or of his grandfather the late *Anthony Hook*. The presence of this defendant *James Hook*, appears to be in no way necessary; and therefore I shall for the present take no further notice of him.

The bills, through a portion of them, seem to consider the next of kin, or as it calls them, the *heirs* of the late *Anthony Hook*, to be parties to this suit. But they have neither been made plaintiffs nor defendants as such; and therefore, all that has been said or proved about them and their agreements must be rejected as mere surplusage. *William McMechen*, a defendant, says he answers 'the bill of complaint of *James Neale and others* represen-

tatives of *Anthony Hook*, deceased;' and, in the body of his answer he says, 'during all which time several of the complainants resided in the neighbourhood of the land.' And others of the defendants seem to have an eye to some other complainant besides *Neale*. These respondents appear, in this respect, to have turned their attention to some of the irrelevant circumstances stated in the bill, without sufficiently regarding its substance. But all such expressions and allusions in the answers must in like manner, be rejected as surplusage.

So much as to the excrescences, the foreign matter and mere careless verbiage of the bill and some of the answers. But before we proceed to consider the merits of the case it will be necessary to ascertain from these pleadings, as accurately as practicable, what is the matter in issue; and what part of the allegations of each has been admitted, taken for true, or is to be sustained or combated by proof. In relation to these matters it will be necessary to explain, recollect and apply some of the general rules in relation to answers.

The *first* of these general rules, which have a bearing upon this case, is, that where the general replication is put in, and the parties proceed to a hearing, all the allegations of the answer, which are responsive to the bill, shall be taken for true; unless they are disproved by two witnesses, or by one witness with pregnant circumstances. The answer to this extent is considered as evidence, and conclusive unless disproved, even although the defendant may have a direct and palpable interest in establishing the truth of what he advances. (*p*) An answer is only so far responsive as it answers to a material statement or charge in the bill as to which a disclosure is sought; and which is the subject of parol proof, but no further. Where a deed, or instrument of writing is necessary to establish any right, and the bill requires the evidence of such right, the answer, unaccompanied and unsupported by such deed or writing, will be no evidence although it should directly respond to the bill; because the answer is only in the nature of parol evidence; and, in such case evidence of a higher grade is required by law. (*q*)

But where the bill asks for the production of evidence, which from the nature of the plaintiff's case, he has a right to claim;

(*p*) *Lenox v. Prout*, 3 Wheat. 527.—(*q*) *Brown v. Selwin*, Ca. Temp. Tal. 242; *Hayward v. Carroll*, 4 H. & J. 521; *Jones v. Slubey*, 5 H. & J. 381.

that may be necessary and useful to him in other cases, besides the one then under consideration, an answer to such a bill is not responsive which merely asserts the fact without saying anything of the evidence, of its existence, or the means of obtaining it. And where a defendant, by his answer, asserts a right affirmatively, in opposition to the plaintiff's demand, the defendant must establish it by proof, or the assertion will be disregarded; for a defendant cannot be permitted to swear himself into a title to the plaintiff's estate. (*r*) But where an administrator is called upon to answer certain matters which appear to have rested exclusively within the knowledge of his intestate, it will be sufficient, that he swears as he is informed and believes; (*s*) but such an answer is to be taken with reference to the reasons given for his belief; for if the reasons are futile, and especially if the alleged belief be in a high degree irreconcilable with the admitted or established circumstances of the case, the answer cannot be credited, nor be allowed thus loosely to swear away the equity of the bill. (*t*)

A *second* general rule is, that every allegation of the answer which is not directly responsive to the bill, but sets forth matter in avoidance or in bar of the plaintiff's claim is denied by the general replication, and must be fully proved or it will have no effect.

A *third* general rule is, that if the defendant submits to answer at all, he must answer fully and particularly; not merely limiting his responses to the interrogatories of the bill; but respond to the whole and every substantial part of the plaintiff's case. He is not, however, bound to go further, and to answer any interrogatory asking a disclosure of matter no way connected with or material to the case. If the answer be in any respect evasive or insufficient, the plaintiff may except to it; and thus extract from his opponent a full and perfect answer. (*u*)

But to this general rule there is a modification, the nature and bearing of which may be sufficiently illustrated by one or two

(*r*) *Ridgeway v. Darwin*, 7 Ves. 404; *Thompson v. Lambe*, 7 Ves. 588; *Boardman v. Jackson*, 2 Ball & B. 335; *Beckwith v. Butler*, 1 Wash. 224; *Paynes v. Coles*, 1 Mun. 395.—(*s*) *Carnan v. Vansant*, 1807, M. S.—(*t*) *Clark v. Van Riemsdyk*, 9 Cran. 160; *Tong v. Oliver*, 1 Bland, 193.—(*u*) *Beam's Orders*, 23, 179; *Hinds v. Dod*, *Barnard*. 258; S. C. 2 Eq. Ca. Abr. 69; *Paxton's case*, 2 Eq. Ca. Abr. 67; S. C. Sel. Cas. Cha. 53; *King v. Marissal*, 3 Atk. 192; *Radford v. Wilson*, 3 Atk. 815; *Hepburn v. Durand*, 1 Bro. C. C. 503; *Deane v. Rastron*, 1 Anstr. 64; *Prout v. Underwood*, 2 Cox, 135; *Mountford v. Taylor*, 6 Ves. 792; *White v. Williams*, 8 Ves. 193; *Somerville v. Mackay*, 16 Ves. 382; ——— *v. Harrison*, 4 Mad. 252; *Wharton v. Wharton*, 1 Cond. Cha. Rep. 117.

instances. A defendant, to a bill of discovery, answered a portion of it, and as to all the other matters therein set forth, he answered and said, that he had no other knowledge of them than what he had obtained confidentially as counsel; and, therefore, declined answering further; this answer was deemed sufficient. And, again, a defendant answered as to part, and as to the residue relied upon the statute of limitations; this answer also was held to be sufficient. In such cases, a part of the answer performs the office of a plea; and the defendant thus makes defence to the whole case by a disclosure of all the facts so far as he is bound so to respond; and for the residue, by presenting such an equitable bar to the plaintiff's claim as is a sufficient excuse for not answering in the manner required by the bill. The exact compass of this modification of the rule, that if a defendant submits to answer at all, he must answer fully, remains yet to be adjusted. Much has been said upon the subject; but, as the cases in relation to this 'distracted point,' as it has been called, have no bearing upon the case now under consideration, they have been thus generally noticed merely to prevent misapprehension. (*w*)

A *fourth* general rule, is one which grows out of the third rule, that exacts a full answer; and requires to be attentively considered in this case; it is, that where the defendant fails to answer any part of the material allegations of the bill, such unanswered allegations shall, at the hearing, be taken to be true. Thus, where the bill demands the delivery of two pieces of property, and the answer makes defence as to one, but is totally silent as to the other. In such case, according to this rule, the bill may be taken *pro confesso* for that as to which the answer is silent; and the plaintiff may obtain a decree accordingly. (*x*)

The propriety of this rule has, however, been questioned; and, therefore, it stands in need of all the support it can derive from authority, reason and analogy.

If, upon exceptions, the answer is held to be insufficient, the defendant will be ordered to answer more fully; and if he fails to do so, in England, sequestration will go against his estate. The plaintiff need not, however, stop there, but may proceed to have his whole bill taken *pro confesso*; for the court is in the habit of

(*w*) 2 Mad. Chan. Pra. 339; *Salmon v. Clagett*, ante 142. — (*x*) *Brown v. Pittman*, Gilb. Eq. Rep. 75; *Abergavenny v. Abergavenny*, 2 Eq. Ca. Abr. 179.

considering an insufficient answer as no answer. (y) In this state, obedience to an order directing a more perfect answer, upon exceptions being sustained, is usually enforced by attachment; but, as in England, on the defendant's failing to answer as ordered, and the process of attachment failing to coerce an answer, as required, the whole bill may be taken *pro confesso*. (z) So where the defendant had answered, and the plaintiff then amends his bill, introducing new matter, he is entitled to an answer to such new matter; because, an amended bill is a part of the original bill, and the defendant's answer thereto is a part of his original answer; and, consequently, the defendant is as much bound to answer the amended bill as to answer each portion of the original bill itself. Therefore if he fails to do so, the plaintiff may proceed, according to the course of the court, and have his whole bill taken *pro confesso*. (a) For, as it has been said, if the plaintiff should not be entitled to such a decree under those circumstances, then the authority of this court would be very defective, and the justice of it might be eluded. (b)

A plea is a special answer to a bill, differing in this from an answer in the common form, as it demands the judgment of the court, in the first instance, whether the special matter urged by it does not debar the plaintiff from his title to that answer which the bill requires. But where, from the matters set forth in the bill, an answer is required to support a plea, it will be overruled without such an answer; upon the ground, that the matters not thus answered are taken for true. As where the bill sets out a claim arising on a mortgage made more than twenty years before the institution of the suit, and then goes on to shew, that there has been such partial payments, or recent acknowledgments as would take the case out of the statute of limitations, were it pleaded. In such case a plea of the statute of limitations must be supported by an answer denying such partial payments and recent acknowledgments; for, otherwise, those circumstances, not being denied by the plea, would be taken for true, if not denied by way of answer, and would shew, that the case had been taken out of the statute. (c)

(y) *Davis v. Davis*, 2 Atk. 21; *Attorney-General v. Young*, 3 Ves. 209; *Bishton v. Birch*, 1 Ves. & B. 367; *Edwards v. McLeary*, 2 Ves. & B. 258.—(z) *Attorney-General v. Young*, 3 Ves. 209; *Seagrave v. Edwards*, 3 Ves. 372.—(a) *Jopling v. Stuart*, 4 Ves. 619.—(b) 1 Harr. Pra. Cha. 277; *Davis v. Davis*, 2 Atk. 21; *Buckingham v. Peddicord*, 2 Bland, 447.—(c) *Plunket v. Penson*, 2 Atk. 51; *Roche v. Morgell*, 2 Scho. & Lefr. 725; *Bayley v. Adams*, 6 Ves. 594.

These authorities appear satisfactorily to sustain this rule; and to shew, that the defendant cannot be allowed, with impunity or advantage to himself, to refuse to answer at all; or in any manner or form to stop short, or to omit to answer any material part of the plaintiff's case; and that the consequence of such refusal or failure is, that the whole bill, or so much of it as remains unanswered, may, at the hearing, be taken *pro confesso*. (*d*)

The proceedings in Chancery have been formed according to the course of the civil law, in some respects, and analogous to the common law in others; and as to all matters of substance there must be the same strictness in pleading in equity as at law. (*e*) Hence it is not unfrequent, where a case arises as to which former decisions furnish no safe guide, to have recourse to the illustrative analogies of the common law. (*f*) Supposing then, that, in relation to this subject, there was a total absence of all manner of precedent and authority, the analogous course of the common law would be found to afford much and strong light.

At common law there are two defaults, the one before, and the other after appearance. The consequence of the first, in England, is, that the defendant may be outlawed; and in this state, in many cases, is, that an attachment may go against his estate. The consequence of the second default, or the defendant's not putting in any plea at all, is, that the plaintiff may have a judgment by *nil dicit*. The plea is called, at common law, the answer of the defendant; and if he fails to answer, judgment is awarded against him on the ground, that he has thus tacitly admitted, or confessed the case of the plaintiff; and left him nothing to litigate or to prove. So, in equity, after an appearance, the taking a bill *pro confesso* where no answer has been put in; or no sufficient answer, after exceptions have been sustained, is analogous to the taking the declaration for true, where the defendant has put in no plea at all, or it has been held insufficient on demurrer. (*g*)

It is a rule, at common law, that every plea must answer the whole declaration, or at least every material part of it, which goes to constitute the gist of the action. But, the defendant may fail, or purposely decline to plead, or answer to every part of the decla-

(*d*) *Abergavenny v. Abergavenny*, 2 Eq. Ca. Abr. 179; S. C. 1 Harr. Pra. Chan. 277.—(*e*) *Moore v. Hart*, 1 Vern. 114; *Story v. Windsor*, 2 Atk. 632; *Dobson v. Leadbeater*, 13 Ves. 233.—(*f*) *Davis v. Davis*, 2 Atk. 21; *Foster v. Vassall*, 3 Atk. 539; *Bayley v. Adams* 6 Ves. 594; *Dolder v. Huntingfield*, 11 Ves. 292.—(*g*) *Davis v. Davis*, 2 Atk. 21; *Buckingham v. Peddicord*, 2 Bland, 447.

ration; in which case, the plaintiff may join issue on the plea and take judgment for the unanswered part as by *nil dicit*. And, we are told, that it is frequently judicious to plead only to part, or to admit a part of the cause of action, in order to save the costs of the trial of such matter; for, nothing can be tried that is not put in issue, and the defendant by declining to answer a part deprives the plaintiff of the power to burthen him with the costs and expense of proving that on a trial which he has not denied and put in issue. (h) So in equity, where the defendant fails, or declines answering any material part of the plaintiff's bill, as to which he seeks and may obtain relief, it amounts to a tacit admission of so much; and such part of the bill may, therefore, be taken *pro confesso*. If the declining to answer a part of the cause of action may, from any motives, be judicious at common law, certainly a defendant in Chancery may be induced, for like reasons, to pursue a similar course; since no costs or expense can be allowed in Chancery any more than at law for the proof and trial of any matter not put in issue. (i)

Upon the whole this rule, in relation to pleadings in equity, appears to be as fully sustained by analogy to the course of the common law as by direct and positive authority.

There is, in many instances, a strong disposition manifested by courts of Chancery, to harmonize their course of proceedings in principle with the positive rules of the common law. But when the Legislature has prescribed rules of proceeding for the court itself; and cases occur, within the spirit, but not within the letter of them, the Chancellor feels himself, not merely invited, for the preservation of harmony, but becomes sensible of a duty to conform; upon the ground, that equity is bound to follow the law in spirit and in principle.

In equity, the consequences of a default before appearance, when pursued to the utmost, seldom enabled the plaintiff to obtain the precise relief he was in quest of; because, there could be no adjudication upon his case, applying the remedy, as specific performance, or the like, exactly to suit it, until the defendant had appeared, and the allegations of the bill had been taken for true or established.

(h) 1 Chitty Plea. 509.—(i) *Matthew v. Hanbury*, 2 Vern. 158; *Watkins v. Watkins*, 2 Atk. 96; *Clarke v. Periam*, 2 Atk. 333, 337; S. C. 9 Mod. 340; *Hawkins v. Crook*, 2 P. Will. 556; *Ward v. Buckingham*, 3 Bro. P. C. 581; *Clarke v. Turton*, 11 Ves. 240; *Smith v. Clarke*, 12 Ves. 477; *Gordon v. Gordon*, 3 Swan. 472; *Blake v. Marnell*, 2 Ball & B. 47.

The English courts, evidently under a strong sense of the necessity of there being some better mode of attaining justice than by a sequestration of the defendant's estate, have carried the doctrine, in relation to substituted and constructive summons, full as far as was within the compass of judicial power; further than it ever was in this state; and yet, short of the point of manifest and general utility. In the year 1718, the parliament partially interposed, and provided the means of enabling a plaintiff to proceed against a defendant, who had not entered his appearance, and to have his bill taken *pro confesso*, which could not have been done in equity until then. (*j*) This statute was introduced into this state; (*k*) and seems to have been the prototype of those various legislative enactments, upon this subject, to be found in our statute book, from the year 1773, down to the present time.

There are many acts of Assembly, under which a bill may be taken *pro confesso* against a defendant, who has not been summoned; nor has appeared. They provide for all the cases, that have, or, as it is supposed can occur; absent or absconding defendants; non-resident defendants, who are either *non compos mentis*, infants or adults; absent or non-resident mortgagors; defendants whose residences are unknown; resident defendants who cannot be found; the case where there are two or more defendants of one or some of them being non-residents; the case of a bill of revivor where the party had removed out of the state, &c. (*l*) And where a party has been returned summoned, but has failed or refused to appear and answer, other acts of Assembly provide, that the plaintiff may, according to a prescribed mode, have his bill taken *pro confesso*. (*m*)

According to the course of the English courts there are cases in which an implied confession is held to be a sufficient ground for a decree. As where the defendant, having appeared, has been attached for not answering, and is brought three times from prison into court, and has the bill read to him, and refuses to answer; such a public refusal in court amounts to a confession of the whole bill. So, too, where a person appears, and departs without answering, after process has gone against him to sequestration. There

(*j*) 5 Geo. 2 c. 25; *Davis v. Davis*, 2 Atk. 23; 1 Fowl. Exch. Pra. 201.—(*k*) Killy Rep. 189.—(*l*) 1773, ch. 7, s. 3; 1785, ch. 72, s. 30 and 31; 1787, ch. 30, s. 1; 1790, ch. 38, s. 3; 1792, ch. 41, s. 2 and 4; 1794, ch. 60, s. 2, 3, 5 and 9; 1795, ch. 88, s. 1 and 2; 1797, ch. 114, s. 2 and 3; 1799, ch. 79, s. 3 and 4; 1804, ch. 107, s. 2; 1820, ch. 161.—(*m*) 1785, ch. 72, s. 19; 1799, ch. 79, s. 1 and 2; 1820, ch. 161.

also the bill is taken *pro confesso*; because it is presumed to be true when he has appeared and departed in despite of the court, and withstands all its process without answering. (*n*) But these modes of having a bill taken *pro confesso* having been deemed, in many respects, too oppressive, or unnecessarily tedious, more easy and expeditious modes have been provided, by which, if a defendant, who has appeared, fails to demur, plead or answer, according to the rules of the court, within a limited time, the bill may be taken *pro confesso*. (*v*)

At law, where the nature and amount of the plaintiff's demand may be distinctly ascertained from the declaration, as in debt, *assumpsit*, upon a promissory note, or the like, the judgment by *nil dicit* is final; but in actions for the recovery of damages only it is not so; because the amount claimed is uncertain; and, therefore, an enquiry must be made and proof heard as to the *quantum* which the plaintiff is entitled to recover. Hence it is, that several of our acts of Assembly, which allow the bill to be taken *pro confesso*, go on to declare, that the Chancellor may, in his discretion, order a commission to issue for the plaintiff to examine witnesses to prove the allegations of his bill; or that the plaintiff may himself be examined on oath; which acts of Assembly, apparently in affirmance of a former course of proceeding, have enabled the Chancellor to call for proofs and explanations in all cases which appear to require it. (*p*)

These, then, are the legislative rules, in regard to the whole bill where no answer at all is put in. But not one of these acts of Assembly, which seem to have provided, with such an infinite deal of care and solicitude, for all the various causes and modes of neglecting or failing to answer the whole bill, do in any manner speak of or allude to the case of a neglect or refusal to answer a distinct and material part only of the whole bill, where an answer is made to all the rest. It has been declared, that a bill may be taken *pro confesso*, and the Chancellor shall proceed to decree in the same manner as if the defendant had admitted by his answer the facts stated in the bill. And in case the defendant has been summoned, or has appeared, and fails to answer, he must be ordered to do so by an appointed day, or an interlocutory decree

(*n*) Forum Rom. 36.—(*o*) 1785, ch. 72, s. 20; 1799, ch. 79, s. 2 and 9; 1820, ch. 161, s. 1; *Buckingham v. Peddicord*, 2 Bland, 447.—(*p*) 1799, ch. 79, s. 5; 1818, ch. 193, s. 5; *Johnson v. Desmoneere*, 1 Vern. 223; *Hawkins v. Crook*, 2 P. Will. 556.

may be entered on the default, and a commission issued *ex parte*. But, in every case, the consequence of the default is, that the bill may be taken *pro confesso*. (q)

Hence, it appears to be clear, that these legislative rules which, according to their letter, are only applicable to a case where there is no answer at all; must, in spirit and in principle, be alike applicable to the case where the answer only covers a part of the material allegations, and is totally and absolutely silent as to the residue of the bill. And, that the unanswered part of the bill must, on the hearing, be taken to be true; otherwise, there would be a manifest inconsistency in the course of the court. But, the reason and principle being the same, the rule must be the same in both cases, if the whole bill be left unanswered it may be taken for true; or if a part only be left unanswered, that part must, in like manner, be taken for true.

These acts of Assembly allowing a bill to be taken *pro confesso* on the defendant's default in not answering, authorize the Chancellor to pass a final decree at once, if he deems it unnecessary to issue a commission. The decree by default, in all such cases, is as absolute as a judgment by default in an action at common law.

The course of the English Court of Chancery is, in some respects, different. There when the plaintiff obtains a decree by default, a provisional clause is superadded, that such a decree is to be binding on the defendant, unless, being served with process, he shall, within a limited time, shew cause to the contrary. And this decree being *sub modo* only, is emphatically called a decree *nisi*; which cannot be, nor ever is considered as final until the party has been served with process, and it has been made absolute by the court itself. (r)

This, it seems, has long been the established practice of the Courts of Chancery of Virginia. So, that where a defendant has not answered the bill, it is held to be error to enter a final decree against him, taking the bill *pro confesso*, without the previous service of a decree *nisi*. (s) And it has also been held, in that state, that where some of the allegations of the bill were not answered, the plaintiff might except to the answer as insufficient, or move to have the unanswered part of the bill taken for confessed. But, if

(q) 1795, ch. 88, s. 1.—(r) 1 Harri. Pra. Chan. 625; Beam's Orders, 198; Halsey v. Smyth, Mosely, 186; Venemore v. Venemore, 1 Dick. 93.—(s) Thompson v. Strode, 2 Hen. & Munf. 19; Legrand v. Francisco, 3 Mun. 83.

he does neither, it must be proved, and he shall not, on the trial, avail himself of any implied admission by the defendant; for where the defendant does not answer at all, the plaintiff cannot take his bill for confessed, without an order of court to that effect, and having it served on the defendant; and this is the only evidence of his admission. Of course, if this mode of proceeding, as to the confession of the whole bill, be correct, it must be equally correct as to any part. (t)

Such is the rule as to the Chancery Courts of England and Virginia. The default in not making any answer at all, and that of not answering all the allegations of the bill are precisely alike in kind, differing only in degree; hence the courts of England, and of that state have applied the same rule, in spirit and principle, to both defaults. The party is allowed to pursue the same course to have his bill, either wholly or partially taken *pro confesso*, according to the extent of the defendant's default.

In this state, no decree *nisi* is ever entered and served on a defendant who has not answered; but an absolute decree may be entered at once, so soon as he can be fixed with the default; which can be at any time after the limited period for answering has elapsed, or when he has elected to make and has actually filed his answers to the bill. The principle and reason of the English and Virginia rule, and that of Maryland, are the same in relation to a partial answer. The courts in each following the spirit of the established or legislative rule, which directs the mode of proceeding in case the defendant puts in no answer at all.

The plaintiff is entitled to an answer to each allegation of his bill, either because he cannot prove the facts, or to aid his proof, or to avoid expense. If the answer be insufficient he may except to it; which has been compared to a demurrer at law for want of form. The sole object of exceptions is to extract from the defendant a more full and perfect disclosure for the benefit of the plaintiff. They are never meant, nor intended, nor are they calculated to benefit the defendant, or to put him upon his guard in any respect whatever. The plaintiff may waive his right to except; and it is always advisable to do so, where his proofs are ample and at hand; and the character or conduct of the defendant

(t) *Jopling v. Stuart*, 4 Ves. 619; *Dangerfield v. Claiborne*, 2 Hen. & Mun. 17; *Thompson v. Strode*, 2 Hen. & Mun. 19; *Coleman v. Lyne*, 4 Rand. 456; *Young v. Grundy*, 6 Cran. 51.

indicates, that he is not altogether trustworthy upon oath; for, in such case the plaintiff will attain his object much sooner by taking the answer as it stands, and proceeding directly to collect his proofs than by stopping to take exceptions. 'This is the case where the answer is an evasive or imperfect response; and yet goes to the whole, and puts in issue all the allegations of the bill. But to what end, or for what purpose, where no explanation or discovery is sought for by an allegation, should the plaintiff, by exceptions, call for an answer to it, when it is impliedly and tacitly admitted by not being answered? In such case, both parties would be delayed and troubled, and the defendant put to much expense without any object whatever.

The general replication puts in issue only the denial or avoidance of the answer; and neither party is allowed, nor can be called on to adduce proof respecting any matter not put in issue. The unanswered part of the bill, therefore, must be admitted, since it cannot be, according to the correct and orderly course of proceeding, proved at the hearing. But, if the unanswered allegations of a bill were required to be proved, or to be rejected altogether at the hearing, then the defendant would be allowed to take advantage of his own *laches*; and a want of frankness would be tolerated and encouraged in a manner altogether unbecoming a court of equity. The plaintiff would be driven to except, in all such cases, merely to extract from the defendant either a general, or an express, instead of a tacit disclaimer or confession; when, in truth, it might have been the intention of the defendant, as it is fair to infer it was, to concede the unanswered allegation for the express purpose of avoiding the costs of an answer, of exceptions and of proofs, by letting a decree by default go for so much as he had left unanswered.

Formerly when the defendant used only to set forth his own case in the answer, without answering every clause of the bill, it was the practice for him to add, at the end of the answer, a general traverse, without that, that the matters set forth in the bill are true, &c. But where the whole bill, and every clause in it, has been fully answered, the adding of a general traverse is rather impertinent than otherwise; and if issue is taken upon this general traverse, it is a denial only of every thing not answered before by the answer. (u) But, there is no case in which this general tra-

(u) Anonymous, 2 P. Will. 87.

verse has ever been relied upon as an answer. If it ever had been so considered, it must have occurred in some of the numerous cases of exceptions to answers, to have insisted on it as such, yet nothing of the kind appears. The whole range of adjudged cases shew, that the extent and compass as well as the sufficiency of the answer, as whether it is as frank as it ought to be, or whether it covers the whole or only a part of the bill, are to be ascertained from the body of the answer itself; and, not from the formal introduction, or the formal general traverse, or conclusion of it. But in this case the usual general traverse, denying the truth of all the unanswered allegations of the bill, has not been added by way of conclusion to any of the answers.

The late *Chancellor* HANSON is, however, reported to have said, that 'no person acquainted with the laws, or rules, or practice of this court, would conceive it the meaning of the Chancellor, that whatever matter stated in a bill is not denied, must be considered as admitted. No! if interrogatories stated in a bill are not answered, the complainant has a right to except to the answer; and, if the interrogatories are proper, the defendant will be compelled to answer plainly, fully, and explicitly. If then any material matter, charged in the complainant's bill, has been neither denied nor admitted by the answer, it stands on the hearing of the cause for nought. This assuredly every lawyer will admit.' (*w*)

But to the latter part of what is here said I have found myself unable to assent; and, therefore, I deemed it a respect due to the memory of my predecessor to set down the authorities and reasons which have led me to a different conclusion. From all that has been said upon the subject, it appears to be agreed on all hands, that the plaintiff, being entitled to an answer to each material allegation of his bill, may except to an answer which omits to respond to any of them; that, in England and Virginia, the plaintiff, by a certain prescribed mode of proceeding, may have the unanswered allegations taken for true; but, if he omits to take that course, for that purpose, and goes to hearing, he must then prove the truth of the unanswered allegations, or they will be disregarded; that, according to *Chancellor* HANSON, the unanswered allegations stand on the hearing of the case for nought; and, that in my opinion

(*w*) *Hopkins v. Stump*, 2 H. & J. 304.

all material allegations of the bill, as to which the answer is entirely silent, are, on the hearing, to be taken *pro confesso*. (x)

A *fifth* general rule is, that where an answer, in the body of it, purports to be an answer to the whole bill, but the respondent declares, that he is entirely ignorant of the matters contained in the bill, and leaves the plaintiff to make out the best case he can, or any language to that effect; and the plaintiff files a general replication, all the allegations of the bill are thus denied and put in issue; and, consequently, all of them must be proved at the hearing against a defendant who has thus answered. (y)

This, in England, is said to be the usual form of the answer of the Attorney-General; and no exception can be taken to such answer, nor, indeed, to any answer of the Attorney-General. (z) The same form and rule prevails here where the Attorney-General appears for the State. This also is, commonly, the form of the answer of an infant, or person *non compos mentis*, who answers by his guardian or committee. And, by a long established practice,

(x) In the case of *Warfield v. Gambrill*, 1 G. & J. 510, it has been since laid down by the Court of Appeals, that 'supposing there is no denial of title in the answer, and that the material allegation in the bill, the seisin of the complainant is unanswered, this is clearly no admission of any unanswered fact.' Chancellor *Hanson*, 2 H. & J. 301, says, if any material matter charged in the complainant's bill, has been neither denied nor admitted by the answers, it stands on the hearing of the cause for nought; and in 6 *Cranch*, 51, *Young v. Grundy*, Ch. J. *Marshall*, in delivering the opinion of the court says, 'that if the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing. Upon a question of dissolution of an injunction, they are to be taken as true.' 'A respondent submitting to answer must answer fully, but if the answer be defective, and insufficient to meet the allegations and interrogatories of the bill, the complainant, desiring a fuller response, must except to the answer. If he do not, he cannot rely on the silence of the respondent in relation to any material allegation, but must prove it.'

Whence it would seem that a new rule has been thus laid down, differing, in some respects, from any spoken of in the text.

On what authority this cited *dictum* of Chief Justice *Marshall* was founded does not distinctly appear from the case as reported in 6 *Cranch*, 51. It certainly does not entirely accord with any of the above mentioned English or Virginia adjudications, and still less with the controverted decision of Chancellor *Hanson*, as reported in 2 H. & J. 301. But as an appeal lies in Virginia from an interlocutory order dissolving an injunction, 5 *Rand.* 332, it is clear, that the judgment of the court on the principal matter in the case of *Young v. Grundy*, declaring, that no such appeal would lie in that case, although it came, most probably, from the Virginia section of the District of Columbia, must have been founded on the act of Congress, 24 September, 1789, ch. 20, s. 22, which declares, that appeals shall be allowed only from *final* decrees and judgments.

(y) *Potter v. Potter*, 1 Ves. 274; *Amlhurst v. King*, 1 Cond. Chan. Rep. 407.—

(z) 2 Mad. Chan. Pra. 335.

individuals, who are, in truth, ignorant of the whole matter as to which the bill requires any disclosure; but who are made defendants as having an interest in the matter in controversy, have been permitted, by this general mode of answering, to deny the whole bill, and to put the plaintiff to prove all its allegations at the hearing. (a) If, however, it appears from the bill, that the defendant has any knowledge of any matter in it, he may be required to answer more fully and particularly to the extent of his knowledge or belief.

Divesting this case then, of all extraneous matter; of all that relates to the two first administrators of the late *Anthony Hook*; because this plaintiff is incompetent, in the representative character in which he sues, to recover any thing, but so much of the personal estate of his intestate as remains in specie; or has remained, and is now in the hands of any one who can be regarded as a trustee for the use of the late *Anthony Hook* and his representatives. Of all that which relates to the next of kin of the late *Anthony Hook*; because none of them, as such, can have any title, but from one of his administrators, and no such title is alleged or pretended; and also, because none of them are made parties to this suit as plaintiffs; and *Barbara Hagthrop* and *James Hook*, who have been made defendants, are neither charged as, nor make any claim or defence in right of their being two of the legal representatives of the late *Anthony Hook*. And the case, when thus cleared, is on the part of the plaintiff simply this:

By a deed, bearing date on the 17th of August, 1797, the late *Anthony Hook* conveyed certain property, therein mentioned, to the late *John Hook*, on the terms specified in the deed; which property came to the hands of the late *John*, and after his death passed into the hands of *Hagthrop* and wife, as his administrators, and is now held and detained by them and the other defendants who claim under them. The plaintiff alleges, that this property, according to the nature and terms of the deed, was conveyed to *John* as an indemnity in case, and upon condition, that he should pay certain debts therein specified; which have not been paid. And consequently, that the late *John Hook* had held, and his legal representatives, and those who claim under them, now hold this property as trustees for the use of the late *Anthony Hook*, and his legal representative, who is now the present plaintiff. Upon which the complainant prays, that this property may be accounted for and delivered up, together with the profits thereof.

The whole of this controversy has grown out of the deed of the 17th of August, 1797, from the late *Anthony Hook* to his son, the late *John Hook*. This indenture, after reciting that *Anthony Hook* being justly indebted to *John Moale* and thirteen other persons therein named, but without specifying the amount due to all or any of them, declares, that *John Hook* had agreed to pay to those creditors of his father *Anthony* their several and respective debts, in consideration of which, and also, in consideration of natural love and affection for his son, and of the further consideration of five shillings, *Anthony Hook* conveyed to *John Hook* his leasehold right to two pieces of land, the one a lot of ten acres, part of the tract called David's Fane, and the other a lot fronting on Alice-Anna street in the city of Baltimore, together with certain negroes and personal property, all which are particularly described. The indenture then concludes in these words: 'To Have and to Hold the said ten acre lot and the other lot on Alice-Anna street for and during all the rest, residue, and remainder of the original terms granted for each respectively, subject to the rents and covenants reserved and contained in the above, in part, recited lease and assignment; and To Have and to Hold all and singular the household and kitchen furniture, plate, and negroes, unto him the said *John Hook*, his executors, administrators, and assigns, forever. *Provided always*, and it is the true intent and meaning of these presents, and of the parties hereto, that if the said *John Hook*, his executors, administrators, or assigns, shall absolutely omit, neglect, and refuse to pay the said recited creditors of the said *Anthony Hook*, their several and respective just debts and demands against the said *Anthony Hook*, then this indenture, and every matter, clause, and thing, therein contained, shall cease, determine, and be utterly null and void to all intents and purposes whatsoever, any thing herein contained to the contrary thereof in any wise notwithstanding.'

This proviso and condition is explicit and unequivocal. The estate conveyed to *John Hook* was to be null and void on his failing to pay and satisfy the enumerated creditors of *Anthony Hook*. It is in fact a conveyance by *Anthony Hook* of certain property to *John* upon condition, that he should advance a certain sum of money for the use of *Anthony Hook*. This proviso, with the recital, gives to the whole the shape and character of a pledge or mortgage from *Anthony* to *John*. It was intended to indemnify *John Hook* for money advanced by him to the use of his father.

And all *John* can claim, by virtue of this deed, is indemnity and reimbursement for any money so by him advanced.

In the ordinary case of a mortgage the grantor is the actual debtor of the grantee; and it is stipulated, that the estate conveyed shall be absolute if the grantor fails to pay at the appointed time. In this case the grantee undertakes to put himself in the place of the creditors of the grantor, or to satisfy those claims, and if he fails to do so, then, it is stipulated, that the estate conveyed shall be void. The object of the grantor, in both cases, is the payment of his debts; and in both, security is the object of the grantee. That security, in equity, extends no further than complete reimbursement; the payment of the whole principal and interest due, and no more. (b) There is no clause in this indenture authorizing *John Hook* to sell the property, and to apply the proceeds to the payment of the claims of the enumerated creditors; and even if there were, it would not have destroyed the redeemable quality of this mortgage, or the resulting use arising out of the nature of this deed. (c)

It is alleged, that the late *John Hook* and his representatives have altogether failed to pay the specified debts in compliance with the stipulations of the deed; if so, *Anthony Hook* had, and his representative now has, a right to a return of this property, with its profits; or, at least, to redeem it on the payment of so much as has been advanced by *John Hook* or his representatives in satisfaction of those claims.

It has been urged, that there is not the least room to deduce from this deed any thing like an implied, or resulting use to *Anthony Hook* and his representatives; because, it is declared to have been made, not only for a valuable consideration, as the payment of debts, and also of five shillings; but likewise for a good consideration, as the natural love and affection from the father to the son.

The doctrine of a resulting use, first introduced the notion, that there must be a consideration expressed in the deed, or otherwise nothing would pass, but it would result to the grantor. It is certain, however, that the rule, in relation to trusts by implication or operation of law, is by no means so large as to extend to every mere voluntary conveyance; and, consequently, if this deed stood alone upon the valuable consideration of five shillings, and upon

(b) *Hughes v. Edwards*, 9 Wheat. 495.—(c) *Turner v. Bouchell*, 3 H. & J. 106.

the good one of natural love and affection; or upon either of them, unconnected with other circumstances, there could be no doubt of its validity as an absolute and effectual conveyance from *Anthony Hook* to *John Hook*. But when other matters are necessarily brought into view, or form a part of the contract, then it is no less clear, that the mere express consideration of five shillings, even with the superadded expressions, 'and of other valuable considerations,' or of natural love and affection, will not prevent the deduction of a trust by implication or operation of law. (d) And where a trust is declared as to part, and nothing is said of the residue, what remains so undisposed of results to the grantor. (e)

This indenture cannot be read with a total disregard of its recital and proviso, two of its most important features. We cannot turn aside from clauses so very striking and efficient as the recital of the cause of its having been made, and the proviso wherein it is said if that consideration alone be not complied with, the whole shall be a nullity. If these matters could be entirely passed over, the argument against a resulting trust would be exceedingly strong if not altogether irresistible. But looking to the recital and the proviso, it is perfectly manifest, that the sole object of the deed was to secure the payment of certain creditors of *Anthony Hook*. If they were not paid, the whole deed, utterly regardless of the consideration of five shillings, and of natural love and affection, was declared to be void. The payment of those creditors was that consideration alone upon which the conveyance was to stand or fall. This is the real extent of the consideration; to this extent and no further, the late *Anthony Hook* parted with his right and interest in this property. Consequently, in the value of this property, beyond that of the aggregate amount of the specified debts, there is an implied or resulting use remaining in *Anthony Hook* the grantor and his representatives; which limited interest of *John Hook* having been always avowedly held by him and those claiming under him by virtue of this deed, and therefore as trustees, neither he nor they can be allowed to derive any protection from the statute of limitations or lapse of time. But no such defence has been relied on by any of these defendants. (f)

There is an express saving in the statute of frauds of trusts by

(d) *Walker v. Burrows*, 1 Atk. 93; *Brown v. Jones*, 1 Atk. 191; *Lloyd v. Spillet*, 2 Atk. 149; *Sculthorp v. Burgess*, 1 Ves., jun., 92.—(e) 2 Fonb. Eq. 116, 133; *Whalley v. Whalley*, 1 Mer. 437.—(f) *Boteler v. Allington*, 3 Atk. 459; *Alden v. Gregory*, 2 Eden. 250; *Purcell v. McNamara*, 14 Ves. 92.

implication or operation of law ; nor does that statute affect trusts of mere personalty ; (g) such uses, therefore, might be established by parol proof, if they were not sufficiently manifest from the terms of the deed itself. (h) Let us now, then, turn to the answers and proofs.

Hagthrop and wife have answered jointly. She, before her marriage with *Hagthrop*, obtained letters of administration on the personal estate of her late husband *John Hook* ; and it is in that character only, that they are now brought here as defendants. They say, in relation to the enumerated creditors of the late *Anthony Hook*, 'that the said *John Hook* paid the said sums of money set out in the assignment, so far as the creditors applied for payment of the same ;' and again, 'that the said *John Hook* accordingly paid the debts particularly mentioned therein, (that is in the deed,) as these defendants believe and charge.'

The first of these sentences cannot be considered as a distinct answer to any extent ; either that the debts have or have not been paid. And the second of them amounts to no more than a declaration of a belief, that they have been paid. Where the nature of the transaction charged in the bill is such as must have been altogether within the knowledge of the intestate, the administrator may answer, as he is informed and verily believes ; but the answer of an administrator must always be taken as well with reference to the reasons given for his belief, as to the nature of the subject of which he speaks. This, however, is a broad assertion of a belief, without giving any reasons for it ; or its appearing or being alleged, that the matter was exclusively within the knowledge of their intestate. In these particulars this answer is not so responsive to the bill as to constitute an available defence.

But according to the bill and the deed, which is made a part of the bill, *John Hook* undertook to pay certain debts due from *Anthony Hook* ; the answer to this charge must then, from the nature of things, be such as would furnish evidence available to *Anthony Hook* or his representatives ; it is that the bill seeks ; for, by the deed, *Anthony Hook* was to be protected from the claims of his creditors therein named ; and upon *John's* affording that protection his title rested. In effect the bill asks, not only whether those debts have been paid or not, but more ; it requires the evi-

(g) *Nab v. Nab*, 10 Mod. 404 ; *Fordyce v. Willis*, 3 Bro. C. C. 587.—(h) *Boyd v. McLean*, 1 John. C. C. 582.

dences of their payment to be produced as a means whereby *Anthony Hook* and his representatives may be protected against those claims. Such evidence, in addition to any thing that might be said in the answer, is also necessary, because it constitutes an affirmative part of that title set up by the representatives of *John Hook* in opposition to the plaintiff's claim, and must therefore be supported by indifferent testimony. All the claims of the enumerated creditors, it is most likely, have been long since barred by the statute of limitations; but, that is a protection which the law itself gave to *Anthony Hook*; he is entitled, by the terms of his deed, to be furnished by *John Hook*, with the evidence of their having been satisfied, as the means of his protection in that form. This answer, therefore, is not for these reasons also so responsive to the bill as to afford the defendants an adequate defence. On advert- ing to the proofs and exhibits, it appears, that *John Moale's* is the only one of the specified claims, that has been satisfied; and none other are to be allowed and paid.

I lay out of this case the testimony of *Henry Burman*, who, as the husband of one of the distributees of *Anthony Hook*, has an interest in establishing the facts to which he testifies, and is, therefore, an incompetent witness. All the other witnesses are competent. From the copy of the unexecuted bond, the declarations of *Bishop Carroll*, and the other occurrences and proceedings in the Orphans Court, found among the proofs, it appears to have been perfectly well understood between *Anthony Hook* and *John Hook*, during their lives, that *John* held as the trustee of *Anthony*, according to the terms of the deed. (i) And it appears, that the representatives of *John Hook* always admitted, that they held under the deed; and yet, except the claim of *John Moale*, it does not appear, that they ever undertook to shew, that any of the claims of the enumerated creditors had been satisfied. It lay upon *John Hook* and his representatives to shew, that those claims were paid; they have not done so. And the truth is, therefore, that, except *Moale's* claim, none of them have been satisfied.

The answer of *Hagthrop* and wife, after some preliminary notices of several allegations in the bill, and those responses as to the payment of the enumerated debts, passes on to a long history of the sayings, actings and doings of sundry of the next of kin of the late *Anthony Hook*, in relation to the ten acre lot; all of which

(i) *Mildmay v. Mildmay*, 1 Vern. 53.

for the reasons already assigned, it will be unnecessary to say any thing further. The bill specially charges, that *Hagthrop* and wife, by a deed dated on the 23d of December, 1819, leased or assigned a part of the lot on Alice-Anna street, to *Matthew Bennett*. Of this special allegation these defendants take no notice; but say, that the late *Anthony Hook*, by an indenture dated on the 8th of May, 1797, conveyed the lot on Alice-Anna street to the late *John Hook*. This is an allegation in avoidance of the bill, and certainly required to be supported by proof. But there is not even an exhibit, nor one tittle of proof in relation to it. This part of the answer therefore passes for nothing. As to all the allegations of the bill, in relation to the negroes, and other moveable property, mentioned in the deed, this answer is absolutely and totally silent; it says nothing. And, consequently, as to so much the bill must, according to the rules herein before laid down, be taken *pro confesso*.

From what has been said, it follows, that the defendants *Hagthrop* and wife, as the legal representatives of the late trustee *John Hook*, will be decreed to deliver up to the plaintiff all the property mentioned in the deed, or to pay the value of so much as they may have converted, or failed to deliver, together with the profits thereof, or the interest on the value; except certain allowances, and those parts wherewith the other defendants may be charged; as I shall now proceed to enquire and determine.

All the other defendants deduce their title, either directly or indirectly, from *Hagthrop* and wife; except *Nathaniel Chittenden*, who traces his claim from the late *John Hook*; but all allege, that they are purchasers for a valuable consideration without notice.

There is no principle of equity better settled, than that such a *bona fide* purchaser will not be disturbed by this court. On the other hand, it is equally well settled, that he who purchases with a knowledge of the trust, becomes himself a trustee; and stands in the place of the vendor under whom he thus claims, subject to all his liabilities. Yet a person, having himself notice, who purchases of one who had not notice, may protect himself by a want of notice in his vendor. Nor shall a purchaser without notice, of a previous purchaser with notice, be affected by the notice of his vendor. And where a purchaser cannot make title, but by a deed which leads him to a knowledge of the fact; and more especially where the deed, by virtue of which he takes, recites or directly refers to that instrument in which the trust is declared, or from which it arises, he shall be deemed cognizant of the fact, and a

purchaser with notice. These are the well established principles of equity upon this subject. (*j*)

William McMechen, in his answer, avers, that he is a purchaser for a valuable consideration without notice; and yet he makes an exhibit by his answer, as a part thereof, of a deed dated on the 9th of September, 1803, under which he takes from *Hagthorp* and wife, in which the indenture from *Anthony Hook* to *John Hook*, out of which the trusts arise, is clearly and distinctly referred to as one of the links in the chain of the title of *Hagthorp* and wife. This, of itself, is enough to shew, that *McMechen* is a purchaser with notice. But the proofs leave no doubt upon the subject; they shew that he had ample notice. This defendant, therefore, will be decreed to deliver up and reconvey to the plaintiff whatever of the ten acre lot, thus acquired by him, he may now hold; and to account for the rents and profits thereof from the date of the deed under which he obtained possession, with such just allowances as he may be entitled to; the nature of which shall be specified.

Samuel Moore and *George A. Hughes* answer jointly, they positively aver, that they are purchasers of *William McMechen* for a valuable consideration without notice. But they exhibit no evidence of title, nor any proof of right whatever. According to the rules and principles before laid down, they cannot be permitted thus to swear themselves into the estate of the plaintiff; and, consequently, even if their answer were, in other respects, fully responsive to the bill, it could not avail them as a defence, unsupported as it is by proof. These defendants will, in like manner, be decreed to deliver up and reconvey to the plaintiff the property held by them; and be also charged with rents and profits from the first day of May, 1818, when it appears they obtained possession.

John Cator, by his answer, states, that he purchased of *McMechen*, that which he holds. His predicament and pretensions are similar, in all respects, to those of *Moore* and *Hughes*. *Cator*, therefore, will likewise be decreed to deliver up and reconvey; and also to account for the rents and profits of what he holds, from the first of May, 1818, when he was let into possession; with such just allowances as shall be specified.

John S. King, by his answer, states, that he leased from the defendant *Cator*; but having exhibited no better title than his les-

sor, will be, in like manner, ordered to deliver up, reconvey, and account for the rents and profits to the plaintiff from the 9th of March, 1819, when he took possession.

John Weaver, in his answer, says, that he too is one of those who purchased of *William McMechen*. This defendant has also left his answer wholly unsupported by any exhibits or proofs. He will therefore be decreed to deliver up, reconvey, and account for the rents and profits to the plaintiff. He admits, that he obtained possession in the year 1819; but does not specify the day or month; a medium, in the absence of such proof, must therefore be assumed, and the account must commence on the first day of July of the year 1819; with such just allowances as shall be specified.

The defendant *John Fitzgerald*, in his answer, states, that, on the 4th of September, 1806, he purchased of *John H. Hall*, a part of a parcel of ground, containing ten acres, part of a tract of land called David's Fancy, that he gave for it a valuable consideration, and had no notice of the claim of the representatives of the late *Anthony Hook*. He then goes on to state, that he purchased of the defendant *Hagthorp* two other parcels of the same ten acre lot, the one on the 9th of August, 1810, and the other on the 17th of June, 1815; and that he purchased a fourth parcel of it on the 17th of September, 1811, of *Gerard Tipton*, for all which he avers he paid a valuable consideration; and that he had no notice of the claim of *Anthony Hook's* representatives. This answer is also entirely unsupported by any evidence whatever; and therefore, this defendant will be decreed to deliver up, and reconvey to the plaintiff so much of the ten acre lot, mentioned in the bill, as he holds; and will also be held accountable for the rents and profits thereof from the dates when he obtained possession of each parcel respectively. The nature of the just allowances to which he may be entitled will be described.

Benjamin Rawlings, surviving executor of the late *William Rawlings*, states, that his co-executrix *Catharine Rawlings*, who had been made a defendant, is dead, that he is in possession of part of the ten acre lot, in the bill mentioned, by virtue of a deed bearing date on the 10th of September, 1804. This answer is also entirely unsupported by proof. This defendant will be decreed to deliver up and reconvey the property so held by him to the plaintiff; and be charged with the rents and profits, as executor, from the date of the deed under which his testator obtained possession, with such just allowances as shall be specified.

The defendant *Matthew Bennett*, in his answer, says, that he is in possession of a part of the ten acre lot, mentioned in the bill, which he holds under a conveyance from *Hagthrop* and wife, dated on the 3d of August, 1810. But this defendant too has left his answer entirely destitute of proof. The bill expressly alleges, that *Hagthrop* and wife, by deed dated on the 23d of December, 1819, leased a part of the lot on Alice-Anna street to *Matthew Bennett*. In relation to which this defendant says nothing in his answer; this allegation of the bill, as against him, must therefore be taken for true. He will be decreed to deliver up and reconvey all the property held by him to the plaintiff; and to account for the rents and profits of each parcel from the time he took possession.

The defendant *Nathaniel Chittenden*, admits, that he holds possession of a part of the lot on Alice-Anna street, to which he derives title through various mesne conveyances, from the late *John Hook*. He avers, that he, and those under whom he claims, were, all of them, purchasers for a valuable consideration without notice; but produces no proof in support of these allegations of his answer. He, therefore, will, in like manner, be decreed to deliver up and reconvey the property so held by him to the plaintiff, and be held accountable also for the rents and profits.

The defendant *James Hook*, on the 7th of February, 1823, filed his answer, as he says therein, to the amended bill of the complainant; but there does not appear to have been any amended bill put upon the record until some time after that day. There is, however, no charge whatever made against this defendant; and therefore the bill will be dismissed as to him with costs.

I have said, that the recital and proviso, of the indenture of the 17th of August, 1797, from *Anthony Hook* to *John Hook*, gave to that instrument the features and character of a mortgage. Consequently the original parties stood, and their legal representatives now stand in the relation to each other of mortgagor and mortgagee, or trustees and *cestui que trusts*. No acts or circumstances appear to have occurred to destroy the redeemable quality of that deed. *Hagthrop* and wife, as administrators of the late *John Hook*, have succeeded to his character of trustee. And the defendants, who all claim under them, except *Nathaniel Chittenden*, who deduces his claim from the late *John Hook*, being purchasers with notice, for so much as they respectively hold, stand charged with the same trusts.

The whole of the property mentioned in the bill has been conti-

nually in the possession of the late *John Hook*, and those who have succeeded to and claim under him ever since the year 1797. They have protected it, relieved it from burthens and charges, and have placed upon some parts of it lasting improvements. It now, therefore, only remains to apply the rules of equity in relation to these matters, and to direct how the accounts shall be taken.

If a mortgagee, without the assent of the mortgagor, assigns the mortgaged estate to an insolvent person, who he puts into possession, he will be held answerable for the rents and profits received both before and after the assignment. Upon the principle of its being a wilful breach of trust to transfer the property to another; which, as trustee, he had no right thus to dispose of to the prejudice of the mortgagor. (*k*) A trustee is, in no case, to be charged with imaginary values; but only with what he actually receives. And the same rule applies to a mortgagee in possession, who is regarded as a trustee. But no default must be imputed to him; for, in all such cases, he will be charged with what he might have made, but for his default. The annual value is that which the premises are actually worth net, according to a fair estimate, clear of all necessary charges.

Under the head of just allowances, it has long been the course of the court, to allow a trustee, or mortgagee, in possession, for all necessary expenses incurred for the defence, relief, protection, and repairs of the estate; such as costs of suit, and fees for taking opinions and procuring directions necessary for the due execution of the trust; (*l*) taxes, paving contributions, ground rent, and sums expended in necessary repairs. (*m*) It has been also said, and I think with justice, that when a mortgagee, thinking himself absolutely entitled, had expended considerable sums in repairs and lasting improvements, he should be allowed the value of them. (*n*) In a modern case, the value of new buildings, erected by the mortgagee, was allowed. (*o*) And a liberal allowance for the improved value of slaves while in the possession of the mortgagee was directed to be made. (*p*) The grounds of these decisions appear to be that a mortgagee in possession is the legal holder of the estate; which the mortgagor may at any time redeem; and so prevent him from making any repairs or improvements; and if the

(*k*) *Powel Mortg.* 948; 2 *Fonb. Eq.* 179.—(*l*) *Fearns v. Young*, 10 *Ves.* 184; *Willis on Trustees*, 123, 147; *Lewin on Trusts*, 452, 456; *Jones v. Stockett*, 2 *Bland*, 417.—(*m*) *Powel Mortg.* 956, n.; *Balsh v. Hyham*, 2 *P. Will.* 455.—(*n*) *Powel Mortg.* 956, n.—(*o*) *Hardy v. Reeves*, 4 *Ves.* 482.—(*p*) *Ross v. Norvall*, 1 *Wash.* 14.

mortgagee has been long in possession claiming adversely, and suffered to treat the estate as his own, and the mortgagor stands by and permits lasting improvements to be made, he shall pay for them. (q)

But the estimate of the value of such lasting improvements is to be taken as they are at the time of accounting or passing the final decree. For, such allowances are made upon the ground, that the improvements do, in fact, pass into the hands of the plaintiff as a new acquisition. And they can only be a new acquisition to him to the extent of their value at the time he recovers or obtains possession of them; and therefore their value at that time is to be allowed, and nothing more. (r) It is also necessary to observe, that in charging rents and profits, the estimate must not include any profits which arise exclusively from such improvements; for, if they were to be embraced by the estimate, the occupier would, in fact, be paying for the profits of that which was his own. Therefore the estimate of rents and profits must be made in exclusion of such as appears to have arisen from the occupying claimant's own expenditure in improvements. (s)

The late *John Hook* disposed of the lot on Alice-Anna street, and his representatives *Hagthorp* and wife, having disposed of the other property in a manner in which they had no right to do, and the bill standing unanswered and for true as to the negroes and moveable property; *Hagthorp* and wife must be charged with the value of the whole of that property and interest thereon from the date of the deed from the late *Anthony Hook* to the late *John Hook*; and the account for the rents and profits of the chattels real, will commence from the same date. *Hagthorp* and wife must be charged with the rents and profits of all the chattels real, mentioned in the bill, up to the time when they, or any part of either passed into the hands of any of the present defendants. But *Hagthorp* and wife will be held liable for the whole charged against the other defendants, or to the amount which all, or any of them may fail, or be unable to pay to the plaintiff. And these defendants must be credited with the aggregate of the debt which was due from *Anthony Hook* to *John Moale*, at the time of the

(q) *Davis v. Simpson*, 5 H. & J. 147; *Hepburn v. Sewell*, 5 H. & J. 211; *Howell v. Baker*, 4 John. C. C. 122; *Rawlings v. Stewart*, 1 Bland, 22, n.; *Strike's case*, 1 Bland, 57; *Rawlings v. Carroll*, 1 Bland, 76, n.; *Swan v. Swan*, 3 Exch. Rep. 413.—(r) *The Kierlighett*, 3 Rob. Ad. Rep. 101.—(s) *Moore v. Cable*, 1 John. C. C. 385.

execution of the deed to *John Hook*, with interest thereon from the time when it appears to have been paid.

The account against each of the other defendants will commence from the day on which it appears by his answer, or by the proofs now in the case, or which may hereafter be exhibited, that he obtained possession; and he will be charged for all the time he held that portion of the property, or until it passed into the hands of another of the defendants. The accounts against each of the defendants who is now a holder of any portion of the property is, for so much as he holds, to be brought down to the time of taking the account.

Whereupon it is *Ordered*, that this case be and the same is hereby referred to the auditor with directions to state an account, or accounts accordingly from the proceedings and proofs now in the case, and such other proofs as may be laid before him. And it is further *Ordered*, that the parties be and they are hereby allowed to take testimony in relation to the accounts, so directed to be stated, on giving three days notice as usual. *Provided*, that the testimony be taken and filed with the register on or before the fifteenth day of January next.

From this order the defendants appealed on the 12th of February, 1827. And the same day, on their petition, the time for taking and returning testimony under it was enlarged to the 16th of April following. At the same time an agreement was filed with a deed from *John Hook* to *Patrick Bennett*, bearing date on the first of January, 1799; by which agreement it is said, 'that upon the final decree to be passed the lot or parcel of ground contained in that deed, and which has since been conveyed to *Harriet Chittenden*, shall be excluded from the decree.' Upon which the Chancellor made a memorandum, that in any future order or decree, that agreement should be noticed and respected. On the first of January, 1828, the auditor filed his report and accounts made up to the 17th of November, 1827.

The plaintiff by his petition stated, that the defendant *Edward Hagthorp* was in possession of a large proportion of the property in the proceedings mentioned; that he was receiving rents from the tenants of it to the amount of \$1,200 *per annum*; that he was in desperate circumstances and without credit, so that when finally called upon to pay the moneys collected by him he would apply for the benefit of the insolvent law; that the defendant *Barbara*,

his wife, was dead; and that, except the defendants *Hughes* and *Moore*, none of the other defendants were in safe and abundant pecuniary circumstances. Whereupon he prayed that a receiver might be appointed, &c.

12th April, 1828.—BLAND, Chancellor.—Ordered, that the matter of this petition be heard on the 20th day of May next. *Provided*, that a copy of this order, together with a copy of the foregoing petition, be served on each of the said defendants, except *Samuel Moore* and *George A. Hughes*, on or before the 22d day of this month. And either party is hereby authorized to take testimony before the commissioners, in the city of Baltimore, to be read at the hearing, on giving three days notice as usual.

The defendant *Hagthorp* on the first of May, 1828, answered the application for a receiver, on oath, in which he admitted, that he held the property in question; but denied, that he had received the amount of rents and profits as charged by the plaintiff; and said, that he believed he should be able to pay all his debts, provided he could obtain justice from those who withheld from him his just rights, &c.

Under this last order some testimony was taken and filed on the 23d of May following, from which it appeared, that the defendant *Hagthorp* was in straitened circumstances, and had himself admitted, that he was not worth a dollar. And that some of that which the witness supposed to be the property in question was occupied by worthless negroes.

After which the defendants, by their petition, stated that their appeal had been dismissed by the Court of Appeals, on the 19th of November, 1828, without costs, 1 G. & J. 308; and it had therefore become necessary to take testimony to enable the auditor to state an account as had been directed by this court. Whereupon they prayed, that a commission might be issued to the Baltimore commissioners, &c.

20th November, 1828.—BLAND, Chancellor.—Ordered, that the parties be and they are hereby allowed to take testimony before the commissioners appointed to take testimony in the city of Baltimore, in relation to the accounts directed to be stated by the order of the 5th of December, 1826, on giving three days notice to the opposite party, or his solicitor, as usual. *Provided*, that no testimony be used before the auditor, or in any way admitted into this

case, unless it be taken and filed with the register on or before the first day of March next.

After which the plaintiff, by petition, renewed his application for the appointment of a receiver and recommended *Edward Pannell* to be appointed, &c. The matter was ordered to stand for hearing on the 29th instant; and then, by consent, the time of hearing was enlarged to the 9th of December following. After which it was brought before the court.

13th December, 1828.—BLAND, *Chancellor*. The application for the appointment of a receiver standing ready for hearing, and the solicitors of the plaintiff having been heard, and no one appearing on behalf of the defendants, the proceedings were read and considered.

There does not appear to be any just grounds for the appointment of a receiver to take charge of the property in the possession of any one except the defendant *Hagthrop*.

Whereupon it is *Ordered*, that *Edward Pannell*, jr. of the city of Baltimore, be and he is hereby appointed a receiver, as prayed by the petition of the said plaintiff; and that as such he is hereby invested with full power and authority to enter upon and take possession of all the houses, lots, lands, and other property; and also to receive and collect all the rents of the said property in the proceeding mentioned, which is now in the possession or under the control of the said defendant *Edward Hagthrop*; and to take care of, rent, or otherwise dispose of the same pending this suit, and subject to the further order of this court, in such manner as may be deemed most advantageous to the parties interested. And with full power and authority to ask, demand, sue for and recover any sums now due or which may hereafter become due for or on account of the rents and profits of the said houses, lots, and premises. And the said receiver shall bring into this court, and account for all moneys, rents, and profits received by him; and, when called on, render a full account, on oath, of all his proceedings. And the said *Edward Pannell*, jr. before he acts as receiver shall execute and file in this case a bond to the state of Maryland in the penalty of one thousand dollars, with surety to be approved by the Chancellor, conditioned for the faithful performance of the trust hereby reposed in him, or that may hereafter be reposed in him by any future order of this court. And the compensation of the said receiver

shall hereafter be determined upon consideration of his trouble, skill, and diligence in the premises.

The receiver gave bond as required. On the 13th of March, 1829, the Baltimore commissioners returned the testimony taken by them under the order of 20th of November. The auditor, in a report filed on the 10th of December, 1829, stated, that he had examined and considered the additional testimony which had been brought in; much of which was uncertain and unsatisfactory; but, that he had, as instructed by the plaintiff's solicitor, restated the accounts, &c. The plaintiff, by his petition, stated, that the auditor had found it difficult to make an accurate report for the want of a plot of the land in dispute, designating the particular part in the possession of each one of the defendants, so as to apply the testimony to each, as directed by the order of the 5th of December. Whereupon he prayed for a survey; for leave to take further testimony, &c.

After which an agreement in the following words was filed. 'It is agreed between the parties to said cause, that *Matthew Bennett*, one of the defendants, be struck out as a party to said bill without prejudice to said cause. And it is further agreed, that the auditor's report be remanded to him; and that the commission to take testimony to be used before the auditor, be remanded to Baltimore, and that a plot be made of the land in dispute in said cause, and the witnesses be examined in relation thereto, agreeably to the complainant's petition filed on the 24th instant. And it is also agreed, that so soon as the auditor's report is completed and filed, that the said cause shall be set down for final hearing.'

5th June, 1830.—BLAND, Chancellor.—Ordered, that this case be and the same is hereby again referred to the auditor; that the said commission, or a duplicate thereof, be sent to the commissioners to take further testimony; and that a survey be made of the property in the proceedings mentioned, as prayed, on giving the usual notice. *Provided*, that the testimony and plots, hereby allowed to be taken and made, be returned and filed in the Chancery Office on or before the 24th day of July next.

Under this order the lands were laid down and plots with much additional testimony was returned.

The auditor, on the 29th of March, 1831, filed his report, in which he says, that he had restated all the accounts and made his

calculations up to the 17th of February, 1831. He then goes on to say, that the complainant had located the four purchases of *Fitzgerald*, a defendant, stating upon his plot the dates of the several conveyances. The auditor has, for want of better evidence, adopted those locations and statements. The complainant has examined three, and the defendant five witnesses to prove the permanent ground rent which those lots would have yielded, if they had been leased between the years 1804 and 1810. *Mary Riley*, one of the complainant's witnesses, has also proved, that there were two houses on the lots erected in or before the year 1797; viz: a single frame house two stories high, and a double frame house one and a half story high. The auditor infers from other testimony, that those houses might have rented for, from three to five dollars a month each. But there is no proof of their value, independent of the ground rents attached to them; and the auditor infers, that the ground was chiefly valuable for the purposes of building, which requires their removal. The auditor, therefore, inclines to think, that he should charge the defendant *John Fitzgerald* only with the average ground rent, as estimated by the aforesaid witnesses. And he has allowed for the value of certain improvements which appear to have been made by the defendant. And the auditor is further of opinion, that the value of the said premises, for the time prior to their alienation, should not be estimated at a higher rate than for the time subsequent.

The auditor further says, that the complainant has also located the possession of the defendant *Benjamin Rawlings*. The plaintiff has examined three, and the defendant five witnesses, to prove its value. It is also proved, that in 1797 there was a small two story frame house on the premises, which, it is inferred from other evidence, might have rented for four or five dollars a month. But there is no proof of its value, independent of the ground annexed to it, and it is supposed the ground was chiefly valuable for building, which would require its removal. The auditor, therefore, thinks he should charge said defendant only with the average ground rent, as estimated by the aforesaid witnesses; and that the value thereof for the time prior to its alienation should not be estimated at a higher rate than for the time subsequent. The complainant has also located the possessions of *John Weaver*, and proved, that the lots, in 1818, might have been leased at a rent of two dollars for every foot fronting on Goodman street; and the auditor has stated the account accordingly. The complainant has

also located the possessions of *John S. King*, *John Cator*, *Samuel Moore*, and *George A. Hughes*, and offered similar proofs of their value. And the auditor has stated the accounts against these defendants accordingly. The complainant has also located the possessions of the defendant *William McMechen*, and offered proof, that in 1818, the property might have been leased at a rent of two dollars per foot fronting on Goodman street, and the auditor adopts this evidence of value for the time since 1818. No further proof has been offered of the value prior to 1818. The complainant has located several small houses on the premises; but has offered no proof that they were erected in 1797. The auditor is not satisfied with his estimate of the value of this property prior to the first of May, 1818; but having no data before him by which it might be corrected, he has adopted it in his present account.

The auditor further says, that the complainant has located the possessions of *Edward Hagthorp* and wife, and offered proof, that the ground fronting on the Ferry road and Goodman street, might have been leased, in 1818, at a rent of two dollars per foot. This proof has been adopted by the auditor in his estimate herewith returned. The auditor excludes any allowance for the rent of the Mansion House, and the house on Light street since the first of May, 1818; because there is no proof of their value independent of the ground attached to them. And the estimates of their value for the time prior to the first of May, 1818, seems defective as it is predicated upon proof of their average value from 1797 to 1827; whereas the proof should have been of their average value from 1797 to 1818. The estimate of the value of the property conveyed to *William McMechen* is unsatisfactory for the reasons before stated. The account, as stated, is nevertheless the best that can be stated from the proofs before the auditor. The allowance for the value of the house on Goodman street is increased to \$1,500 on the authority of the depositions of *Thomas Childs* and *Richard A. Shipley*, filed 16th August, 1830. All the accounts are stated with interest to this date.

To this report of the auditor, the defendant *Edward Hagthorp* excepted; *first*, because the auditor had charged him with the sum of two dollars per foot for the lands fronting on the Ferry road and Goodman street, which was not sustained by the proofs. *Second*, because the auditor had charged this defendant with the value of certain negroes, personal property and chattels real, amounting to \$60,667 30, when in truth such negroes, personal property and

chattels real, and the value thereof, are not sustained by any proof. *Thirdly*, because the auditor hath not allowed this defendant the several sums of money laid out, expended and paid by him on account of the lands and property mentioned in the the proceedings; and for large sums of money paid to the representatives of *Anthony Hook* by this defendant, and the defendant *Barbara*, all which are fully proved by sufficient evidence. And *fourthly*, because this defendant is made debtor for \$56,899 42, when in truth all the negroes, personal property and chattels real, whence that sum arises, principally belonged to him, though claimed under *Barbara*, all which is fully sustained by the proof.

The defendant *Benjamin Rawlings* also excepted to this report of the auditor. *First*, because he had placed too high an estimate on the annual value on the lot therein mentioned; and charged this defendant with more ground rent for the same than was justified by the evidence. And *secondly*, because the auditor has not estimated the value of the improvements erected on that lot at as much as they are shewn by the evidence to be worth. And the defendant *John Fitzgerald* excepted also to this report of the auditor for the same reasons.

After which the plaintiff, by his petition, filed on the 5th of October, 1831, stated, that since the passing of the order of the 5th of December, 1826, the defendant *Chittenden* had departed this life, and that the lot of ground which had been held by him, as in the proceedings mentioned, was then in the possession of *Harriet Chittenden*, his widow and legal representative; that this plaintiff has since discovered, that the title to this lot of ground was, in truth, and only deducible from the deed of trust of the 17th of August, 1797. Wherefore he prayed, that the agreement, filed on the 12th of February, 1827, might be rescinded and withdrawn. Upon which the Chancellor suggested to the solicitors, that as the case had abated by the death of the defendant *Chittenden*, there could be no further proceedings had until it had been revived against his legal representatives.

Charles Frenour, by his petition, filed on the 29th of November, 1831, stated, that prior to the execution of the deed of trust of the 17th of August, 1797, the late *Anthony Hook* had by a deed bearing date on the 8th of May, 1797, conveyed the one-half of the lot on Alice-Anna street to *John Hook*, from whom it had passed to this defendant *Edward Hagthrop*, under whom this petitioner claimed. Whereupon he prayed, that all such of the proceedings, in this

case, as related to the one-half of the lot so claimed by him should be stricken out, &c.

29th November, 1831.—BLAND, *Chancellor*.—*Ordered*, that the matter of the foregoing petition stand over until the case shall have been revived and brought before the court for a final hearing.

After which the plaintiff, by his petition, stated, that the controversy in relation to the ten acre lot was then ready for final hearing, and the parties interested all before the court; that the controversy in relation to the lot on Alice-Anna street was not then ready for final hearing, inasmuch as one of the parties in interest was not before the court. And as the controversy in relation to the ten acre lot may be finally determined without injury or inconvenience, leaving the property on Alice-Anna street for future adjudication. And as the matters now remaining in dispute, and the difficulties in the way of a final decision, in relation to the Alice-Anna street property, present no obstacles to a final decision in relation to the ten acre lot; and inasmuch as the parties are in needy circumstances; and also as the property cannot be improved until the right to it is finally settled; the petitioner prayed, that the court would proceed to a final decision upon the questions in regard to the ten acre lot, retaining for future adjudication so much of the controversy as relates to the property on Alice-Anna street.

17th February, 1832.—BLAND, *Chancellor*.—Where there are a plurality of defendants, and one of them dies, who had an interest which does not devolve upon the surviving parties, but which might, in all respects, have been separated by that final decree which the court would have passed; and which interest of the deceased is of such a nature as not necessarily to involve an expression of the judgment of the court upon that which does obviously constitute a component part of the title relied upon by the surviving defendants, it may, in some instances, be expedient and proper to pass a decree upon the matter in controversy as to the surviving defendants, and to leave the separate interest of the deceased open to be afterwards brought before the court at a more convenient season, or when required by his representatives. (*t*)

But here all the original defendants alike derive title under or in opposition to one and the same deed; upon the true construction

(*t*) *Bressenden v. Decrees*, 2 Ca. Cha. 197; *East India Company v. Coles*, 3 Swan. 142; *Ferrers v. Cherry*, 1 Eq. Ca. Abr. 4; *Lingan v. Henderson*, 1 Bland, 236.

of which all their titles must mainly depend; and therefore they have all of them been properly brought before the court as parties. It is true, that any one of them might, under circumstances peculiar to himself, have been enabled to sustain his own pretensions alone; yet the deed of the 17th of August, 1797, being that foundation upon which the plaintiff plants his claim against all, an expression of the court's opinion upon that deed, from what has been shewn, must necessarily and alike affect all; and the directions, upon that ground, have been given for taking the accounts. Hence, although the property in the hands of each defendant may be entirely distinct, and the *quantum* of liability of each may be different; yet the origin and foundation of the controversy is essentially and necessarily the same as to all. And, therefore, before the case can be suffered to proceed, the bill must either be dismissed or absolutely abated as to the claim of the deceased defendant *Chittenden*, or be revived against his representatives.

Whereupon it is *Ordered*, that the foregoing petition be and the same is hereby dismissed with costs.

After the filing of a petition to make *Harriet Chittenden* a party, and she had been returned summoned as the administratrix and legal representative of the deceased defendant *Nathaniel Chittenden*, by a writing, signed by the solicitors of the parties, and filed on the 14th of May, 1832, it was agreed between the complainant and *Harriet Chittenden*, administratrix of *Nathaniel Chittenden*, deceased, that the petition filed against her should be dismissed; and the agreement heretofore entered into relative to the property in her intestate's possession be confirmed.

4th August, 1832.—BLAND, *Chancellor*.—This case standing ready for hearing and having been submitted by the plaintiff without argument, and no one appearing for the defendants before the close of the sittings of the term, the proceedings were read and considered.

It appears, that the auditor has, in all respects, made his estimates according to the principles, and in the manner directed by the order of the 5th of December, 1826, with interest on the amount of rents and profits charged to each defendant from the end of each year when they were received; and the whole appears to be well sustained in point of fact by the proofs, in the manner he has stated; therefore overruling all the exceptions to his report, it must be confirmed; subject, however, as regards the defendant *Edward Hagthrop*, to a deduction for that amount of rents and

profits of the property held by him from the time it was placed in the hands of the receiver, until the 17th of February, 1831, up to which day the auditor's statements have been made.

It appears to have been the practice in many cases in this court, where the object of the suit was to recover certain specified property, together with its rents and profits during the time of its unjust detention, to order an account of the rents and profits to be taken before the property itself was ordered to be delivered up. The inevitable consequence of such a course of proceeding is, that after the account has been so taken, and the property has been delivered, there will remain a claim for an unascertained amount of rents and profits which have accrued between the time up to which the account had been taken, and the delivery of possession, to be adjusted and recovered by a subsequent proceeding. (*u*)

Observing the impropriety and inconvenience of this practice, I shall follow it no further. In cases of this kind a final decree should be passed directing the specific property to be delivered up; followed by a clause directing an account of the rents and profits to be taken up to the time of such delivery. By such a decree the controversy would be so far terminated; and the property itself being thus transferred to its true owner, there could be no occasion to call for the appointment of a receiver, as in this instance, to preserve it from any loss or injury to which it might be exposed while remaining in the hands of the defendant. And an exact period being thus fixed up to which the account may be brought by such a final determination in favour of the plaintiff's title, his rights, consequent upon that determination may be also finally decided, and the whole case closed, without going again to the auditor for a further account. (*w*)

It will be necessary, however, again to send this case to the auditor for the purpose of stating a final account upon the same principles, and in continuation of that last stated by him, shewing the amount of rents and profits with which each defendant is chargeable from that time to the time when the property shall have been delivered to the plaintiff. And for this purpose, the receiver in whose hands the property held by the defendant *Edward Hagthorp* has been placed, must also be ordered to make a

(*u*) *Crapster v. Griffith*, 6 H. & J. 144; S. C. 2 Bland, 5.—(*w*) *Kipp v. Hanna*, 2 Bland, 36.

full report, on oath, of all his proceedings up to the time he shall have delivered the property now in his possession to the plaintiff.

The bill must now be dismissed with costs as to the defendant *James Hook*, for the reasons before given. And, as the claims against the defendants *Nathaniel Chittenden* and *Matthew Bennett* have been abandoned by the plaintiff, there can be no occasion for any such relief as is prayed by the petitioner *Charles Frenour*; and therefore all the proceedings in relation to these three persons may be at once and finally dismissed.

Whereupon it is *Decreed*, that the report of the auditor, made and filed on the 29th of March, 1831, be and the same is hereby ratified and confirmed, and all the exceptions thereto are overruled.

And it is further *Decreed*, that all deeds and conveyances from the said defendants *Edward Hagthrop* and *Barbara* his wife, or either of them, or from any other person or persons claiming by, through, or under them, or either of them, for all or any portion of the chattels real, in the proceedings mentioned, called the ten acre lot, unto the said defendants *William McMechen*, *Samuel Moore*, *George A. Hughes*, *John Cator*, *John S. King*, *John Weaver*, *John Fitzgerald*, and *Benjamin Rawlings*, or any or either of them, or unto any person under whom they, or any, or either of them claim, be and the same are hereby deemed, taken and declared to be utterly null and void to all intents and purposes whatever. And the said defendants *Edward Hagthrop*, *William McMechen*, *Samuel Moore*, *George A. Hughes*, *John Cator*, *John S. King*, *John Weaver*, *John Fitzgerald*, and *Benjamin Rawlings*, are hereby directed and required forthwith to re-assign and reconvey the whole of the chattel in the proceedings mentioned, called the ten acre lot, unto the said plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased; and that *Nathaniel Williams* of the city of Baltimore, be, and he is hereby appointed trustee for the purpose of making and executing such conveyance to the said plaintiff, in the name of the said defendants, according to the provisions of the act of Assembly in such case made and provided. (x)

And it is further *Decreed*, that the defendant *Edward Hagthrop* and the receiver *Edward Pannell*, jr. forthwith deliver up all that portion of the said ten acre lot, which is, or may be in possession of them, or either of them, as in the proceedings mentioned, unto

the plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased; and that the defendant *Edward Hagthorp* forthwith pay or bring into this court to be paid unto the plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased, the sum of \$56,899 43, with interest on \$33,879 76, part thereof, from the 17th day of February, 1831, until paid or brought into court; subject, however, to a deduction for such an amount for rents and profits which have accrued and been received by the said receiver under the order of the 22d day of November, 1828, and before the 17th day of February, 1831.

And it is further *Decreed*, that the defendant *William McMechen* forthwith deliver up all that portion of the said ten acre lot which is, or may be in his possession, as in the proceedings mentioned, unto the plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased; and that the defendant *William McMechen* forthwith pay or bring into this court to be paid unto the plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased, the sum of \$15,532 41, with interest on \$10,501 92, part thereof, from the 17th of February, 1831, until paid or brought into court.

And it is further *Decreed*, that the defendants *Samuel Moore* and *George A. Hughes* forthwith deliver up all that portion of the ten acre lot which is, or may be in the possession of them, or either of them, as in the proceedings mentioned, unto the plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased; and that the defendants *Samuel Moore* and *George A. Hughes* forthwith pay or bring into this court to be paid unto the plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased, the sum of \$4,160 47, with interest on \$3,070 67, part thereof, from the 17th of February, 1831, until paid or brought into court.

And it is further *Decreed*, that the defendant *John Cator* forthwith deliver up all that portion of the said ten acre lot which is or may be in his possession, as in the proceedings mentioned, unto the plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased; and that the defendant *John Cator* forthwith pay or bring into this court to be paid unto the plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased, the sum of \$3,208 16, with interest on \$2,354 33, part thereof, from the 17th of February, 1831, until paid or brought into court.

And it is further *Decreed*, that the defendant *John S. King* forth-

with deliver up all that portion of the said ten acre lot which is or may be in his possession, as in the proceedings mentioned, unto the plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased; and that the defendant *John S. King* forthwith pay or bring into this court to be paid unto the plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased, the sum of \$952 30, with interest on \$716 33, part thereof, from the 17th of February, 1831, until paid or brought into court.

And it is further *Decreed*, that the defendant *John Weaver* forthwith deliver up all that portion of the said ten acre lot which is or may be in his possession, as in the proceedings mentioned, unto the plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased; and that the defendant *John Weaver* forthwith pay or bring into this court to be paid unto the plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased, the sum of \$3,989 94, with interest on \$3,023 22, part thereof, from the 17th of February, 1831, until paid or brought into court.

And it is further *Decreed*, that the defendant *John Fitzgerald* forthwith deliver up all that portion of the said ten acre lot which is or may be in his possession, as in the proceedings mentioned, unto the plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased; and that the defendant *John Fitzgerald* forthwith pay or bring into this court to be paid unto the plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased, the sum of \$4,020 97, with interest on \$3,054 25, part thereof, from the 17th of February, 1831, until paid or brought into court.

And it is further *Decreed*, that the defendant *Benjamin Rawlings*, surviving executor of *William Rawlings*, deceased, forthwith deliver up all that portion of the said ten acre lot which is or may be in his possession, as in the proceedings mentioned, unto the plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased; and that the defendant *Benjamin Rawlings*, surviving executor of *William Rawlings*, deceased, forthwith pay or bring into this court to be paid unto the plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased, the sum of \$2,320 34, with interest thereon from the 17th of February, 1831, until paid or brought into court.

And it is further *Decreed*, that the bill of complaint, as against the defendants *James Hook*, *Matthew Bennett*, and *Harriet Chittenden*, administratrix of the late defendant *Nathaniel Chittenden*, de-

ceased, be and the same is hereby dismissed with costs, to be taxed by the register.

And it is further *Decreed*, that the receiver *Edward Pannell, jr.* forthwith pay or bring into court to be paid, all the moneys collected by him as such, unto the plaintiff *James Neale*, administrator *de bonis non* of *Anthony Hook*, deceased; and that the said receiver render unto this court, without delay, a full account, on oath, of all his proceedings as such. And this case, as regards the said receiver, is hereby referred to the auditor, with directions to state an account between him and the plaintiff; allowing to the said receiver a commission of eight *per centum* as a compensation for his trouble.

And it is further *Decreed*, that this case, as regards those defendants against whom the bill of complaint has not, by this decree, been dismissed, be and the same is hereby referred to the auditor, with directions to state an account or accounts upon the principles, and in continuation of the accounts last reported by him from the proofs and proceedings now in the case, and such other proofs as may be laid before him, shewing the amount of the rents and profits with which each of the said defendants is chargeable from the 17th of February, 1831, to the time when that portion of the said chattel real called the ten acre lot held by them, or any or either of them, shall have been delivered up as herein directed to the plaintiff *James Neale*.

And it is further *Decreed*, that the petition filed in this case by *Charles Frenour*, be and the same is hereby dismissed with costs, to be taxed by the register.

And it is further *Decreed*, that the defendants as against whom the bill of complaint has not been dismissed, pay unto the plaintiff his costs in this suit, to be taxed by the register.

As to the manner in which this case was finally disposed of by the Court of Appeals, see 7 G. & J. 13.

THE CAPE SABLE COMPANY'S CASE.

An action of assumpsit may be sustained against a corporation founded on its acts done within the legitimate purposes of its institution.—No authority to appear to an action against a body politic can be given unless it appears to have been given by the president as under its proper corporate name.—Where the incorporating legislative enactment requires the assent of three-fourths of the stockholders to make a contract or mortgage, it will be deemed void unless such assent be shewn; and the confession of a judgment to secure a debt is an encumbrance which requires such an assent within the meaning of such a provision in the incorporating enactment.—Where, on a bill filed against a corporation, it is admitted to be in a condition of absolute insolvency, it may be thenceforward proceeded on as a creditor's suit, a decree passed, directing all the property of the body politic to be sold, and notice to be given to its creditors to bring in their claims.—A body politic may have a local habitation; and should be sued in the county in which it is located.—Although by declaring, that the property of a corporation shall be held as real estate, and descend as such, its personalty must be so treated as regards the stockholders, it does not follow that it must be so considered in all other respects. A co-partnership may be dissolved by some of its members becoming, as to the same purposes as the partnership, a body politic under an act of incorporation.

No bond is required in certain cases on the granting of an injunction to stay execution at law.—Where there are two or more defendants the injunction will not, in general, be dissolved on motion until all of them have answered.—Where a claim, in a creditor's suit, has been put in issue and established between the proper parties, it cannot be called in question by any other creditor who may come in thereafter.

The nature of poundage fees allowed to the sheriff on an execution; the mode in which they may be recovered; and the grounds upon which the sheriff may obtain relief in equity.—Where by a decree, passed with consent, real and personal property upon which an execution had been levied, is taken from the sheriff and sold, without discrimination, his poundage fees will be allowed for the whole debt, first on the whole appraised value of the personalty, and for the residue on the realty.

Where the lien of a judgment has expired, by lapse of time, it cannot be revived so as to overreach a lien which has attached during the time of such lapse.—The lien of a judgment upon land being an incident of its liability to be taken in execution under such judgment, there can be no lien where there is no direct or indirect mode of having an execution, founded on such judgment, levied upon such land.—But now and here, the judgments and decrees of the county courts, the Court of Chancery, and the Court of Appeals, give a lien upon the lands of the defendant every where within the state.—A citizen can only be sued or arrested by civil process in the county in which he resides; but may be taken by an attachment from the High Court of Chancery any where within the state.

THIS bill was filed on the 4th of January, 1823, by *Addison Ridout, Joseph Jubere, John J. Gibson, Ann O. Gibson, John L. Tilghman* and *Maria E.* his wife, and *Horatio Gibson*, against *The Cape Sable Company, Richard Caton, Robert Oliver* and *John Oliver*. This bill sets forth, that these plaintiffs had, on the sixth of August, 1822, filed a bill in this court against these

defendants, *The Cape Sable Company* and *Richard Caton*, and also against *Charles Carroll of Carrollton*, *Alexander Mitchell* and *William McMechen*, for the purpose of obtaining payment of certain large sums of money, &c.; that by an act passed on the 18th of February, 1819, *Richard Caton*, *John Gibson* and others, constituting the association under the deed of the 21st of June, 1813, were incorporated by the name of *The Cape Sable Company*; (a) and were completely organized, as such, accordingly, on the first Monday, or fifth day of April, 1819. This bill moreover proceeds, as is stated by the Chancellor in delivering his opinion, to set forth the rights of these plaintiffs; and their object in filing this bill. Whereupon they prayed for relief and an injunction. Which injunction was granted accordingly. On the 7th of March, 1823, *Robert* and *John Oliver* put in their joint and separate answer; and obtained an order, in the usual form, for a dissolution of the injunction at the ensuing term; when the motion was brought before the court.

21st April, 1823.—JOHNSON, Chancellor.—An injunction issued in this case to prevent the sale of the property of *The Cape Sable Company*, taken in execution under a judgment obtained by *Robert* and *John Oliver* against the company, in Anne Arundel County Court. To the bill filed, on which the injunction was ordered, the *Olivers* have answered; and, at the present term, the motion to dissolve the injunction was elaborately argued. Since the argument the case has been maturely considered. It is a cause of a novel description, demanding full reflection, not only from the character of the case, but from its importance in respect to the amount of property in controversy.

In the year 1812 an agreement was entered into between *John Gibson*, *Richard Caton* and others, and a company was formed to search for coal in Anne Arundel county; and, to enable the company to carry their objects into execution, *Gibson*, by a deed, executed on the 21st of June, 1833, conveyed several tracts of land to *Charles Carroll* in trust. By the agreement and deed all the interest in the land, and the works then or thereafter erected, and in the profits and emoluments were divided into sixty shares; twenty to *Gibson*; thirty-nine to the other persons, mentioned in the deed, and the remaining share to *Gibson*, to be disposed of for the common interest. Twenty-five out of the thirty-nine shares to

Richard Caton, and the residue to the children and grandchildren of *C. Carroll*, whose daughter was the wife of *Caton*.

Gibson, on the 20th of May, 1815, conveyed his interest to *Addison Ridout* and *Joseph Jubere* in trust for *Gibson* and wife during their lives and the life of the survivor; and after the determination of those estates, to the use of the other complainants in the bill mentioned. *John Gibson* and wife are dead, the former died in 1819, the latter in 1822, by which the beneficial interest in the premises became vested in the complainants as disclosed by the bill.

By an act of the General Assembly of Maryland, passed in the year 1818, the company was incorporated by the name of *The Cape Sable Company*. As so large a portion of the stock of this company was owned by *Caton*, and his connexions, lest the affairs of the corporation should be completely in their power, and all the property subject to their control, and to their disposal, the act directs the manner in which the affairs of the company shall be conducted; to wit: by a president, two directors, and an agent. It vests in the corporation the power 'to sell and dispose of their property, to mortgage the same or any part thereof with the consent of three-fourths of the stockholders, holding three-fourths of the shares, for securing of any loan or debt.' The act of incorporation authorizes the company to make by-laws, &c.; but, lest the funds of the company should, by a majority, be applied to other objects than those in view, at the passage of the law, it provides, that 'the company shall engage in no other manufacture, except that of alum and copperas, without the consent in writing of three-fourths of the stockholders, holding three-fourths of the shares.' (b)

On the 6th of August, 1822, *Addison Ridout*, *Joseph Jubere*, and the other complainants in this cause, the persons beneficially entitled to the property under the deed of trust from *John Gibson*, filed a bill in this court against *The Cape Sable Company*, *Charles Carroll*, *Richard Caton*, *Alexander Mitchell* and *William McMechen*, for an account of the profits of the company, and for the payment of what might appear due to them. This bill and the exhibits filed therewith are parts of the present bill. To that bill no answer has yet been made.

On the 29th of November, 1822, *Richard Caton*, one of the defendants to the first bill, and called on by it to give an account

of the state of the concerns in lieu of furnishing that account, wrote to a practising attorney of Anne Arundel county, as follows: 'I hereby authorize *Alexander Contee Magruder, Esq.* to appear to a suit to be docketed in Anne Arundel County Court, in the name of *Robert and John Oliver* on the within *Nar.* and to confess judgment thereon. Baltimore, 29th Nov'r, 1822. *Richard Caton*, Pres'd't of the A. & Copp's Co. of Cape Sable.' In virtue of this authority, the following note was made. 'Enter my appearance for def't and a judgment as above. *A. C. Magruder*, for def't.' In virtue of this authority, on the 9th December, 1822, at the adjourned October term, a suit was docketed as follows: '*Robert Oliver and John Oliver vs. The Cape Sable Company.* Case *Nar.* Docketed by consent. Errors released. Judgment for \$30,000 cur't money, damages and costs. To be released on payment of \$17,000, cur. money, with interest thereon from the 20th day of February, 1822, and costs.' No account was filed in the cause; and all the authority for the judgment is as disclosed. Immediately on obtaining a judgment, a *feri facias* issued; and the whole property of the company, real and personal, is taken in execution; and on the 14th of the same December advertised by the sheriff to be sold on the 6th of January then ensuing, for cash.

On the 4th of January, two days previous to the time fixed on for the sale, the present bill was filed, which states the facts here related; and that no notice of the demand was given to your orators who represent the interest of *John Gibson*, who was entitled to one-third of the stock of the company; no opportunity was offered them of contesting it; but in pursuance of an arrangement entered into between *Caton* and the plaintiffs, the proceedings mentioned took place. That at the time the judgment was given, with such eager precipitation, the manufactories were carried on by the company, yielded such great profits, that the debt, if really due, would have been satisfied, if the usual course, which precedes the obtension of judgments, had been pursued. The bill also states, that *Caton*, combining and confederating with *Robert and John Oliver* to injure and defraud, and with a view of placing beyond their reach the property caused the judgment and proceedings.

To this bill, as well as the first, *Richard Caton*, against whom such serious charges have been made, has not answered.

Robert and John Oliver, in their answer, admitting the judgment, deny that in entering the said judgment there was any illegal confederation or fraud on the part of those respondents, or as far

as they know, on the part of any other person ; so far from it, they positively aver, that the whole amount for which the judgment was entered was, at the time of entering the same, and still is justly and fairly due. The answer states, that at the instance of *Richard Caton*, he being legally constituted president, they loaned to the company, at different times, several sums of money, amounting in the whole to the sum of \$17,000, on the 20th February, 1822, under an engagement entered into by *Caton* with them, he being fully authorized to make such engagements, that the said company would render them secure by giving them a judgment against the company. That the pecuniary embarrassments of the company, at the time when the advancements were made, were such, but for them, an entire stop must have been put to their proceedings, to the great loss and injury of all concerned. The only likely way to better their condition was to procure loans on the faith of the property; that they authorized their president to enter into such loans, and to pledge, if necessary, the funds of the company; that the loans never would have been made if such security had not been obtained; or some other good and sufficient indemnity; without the loans the company must have come to a stop.

Several questions present themselves, arising from the facts disclosed by the bill and answer. *First.* Admitting that the whole sum of money was loaned, could the defendants *Robert* and *John Oliver* have supported an action of assumpsit at law, and obtained a judgment, if the claim had been contested, and the opinion of the court taken thereon? *Second.* If it was competent for the defendants *Robert* and *John Oliver* to have sustained a suit on an action commenced and conducted in the usual manner, is the authority, that was given by *Richard Caton* such as to authorize the entering of the present judgment? *Third.* Ought the injunction to be dissolved without the answer of *Caton*, supposing the opinion in the two preceding points to be favourable to the defendants?

In forming an opinion in this cause I deem it unnecessary to review the various decisions, how far a corporate body can contract; except under the corporate seal. That subject was fully and maturely considered in the case of *The Bank of Columbia against Patterson*, and is ably treated in the opinion of the Supreme Court of the United States, as delivered by *Judge STORY*. (c) It

was also under the consideration of the Court of Appeals of this state in the case of *Kennedy v. The Baltimore Insurance Company*. (d) With the conclusion drawn by the Supreme Court of the United States, in delivering their opinion of the extent to which corporate bodies are bound by contracts not under the corporate seal, I concur, as well as with the position taken by the Court of Appeals of this state.

In the first case, after reviewing the authorities the conclusion the court arrives at is, 'it would seem to be a sound rule of law, that, whenever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts, made by its authorized agents, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request raise implied promises, for the enforcement of which an action may well lie.' In the opinion of the Court of Appeals it is laid down; 'the position is not to be controverted that, generally, a corporate body cannot act, but by its seal; but this position cannot be extended so far as to prevent their liability from the nature of the institution; or for acts done necessarily and incidentally arising from an authority delegated by such body to their agent legally appointed.'

In the case before the Supreme Court of the United States, the plaintiff's claim arose for work done on the banking-house itself, in virtue of an engagement made by the plaintiff with an acknowledged duly authorized committee of the corporation. The work done was necessary for carrying on the affairs of the body politic; and the work having been done, the demand of the plaintiff against the Bank, thus founded, was sustained. The cause before the Supreme Court of Maryland, was to recover money received by the agent of the corporation, in the ordinary and usual course of his agency; which money was adjudged to be due to the plaintiff. The agent was duly authorized, and acting in the ordinary course of his business. How different are these causes from the one now under consideration!

At the time when the judgment in this case was entered the bill alleges, that the manufactories were carried on by the company yielding such great profits, that the debt of *Robert and John Oliver*, supposing it to be really due, must have been satisfied before the time would have arrived for rendering judgment in the regular

course of law. To this allegation in the bill no answer is given by the defendants; their answer is silent on the subject. In the answer of the defendants it is stated, that on the 20th of February, 1822, seventeen thousand dollars were due on account of loans to the company at different periods. When the loans commenced, and the amount of each, as well as the time of each advance, is not disclosed, either by the answer, or by any other part of the transaction. At the time when they begun the situation of the company was so deplorable, that but for them, the answer alleges, an entire stop must have been put to the proceedings, to the great loss and injury of all concerned. Yet take the answer and bill together, when the situation of the company was so flourishing as to enable it, in the short space of time a suit would have occupied, to discharge a debt of \$17,000, an immediate and instantaneous determination is to put a stop to the works; at least so far as the interests of the complainants in them extended.

Admitting the facts to be as set forth in the answer, that the stockholders, at a time of embarrassment and difficulty, authorized *Caton* to borrow money to carry on the works; can it follow, from that authority, that he had a right to such an extent to bring on ruin and destruction? In obtaining those loans, was *Richard Caton* acting, to use the language of the Supreme Court of the United States, within the scope of the legitimate purposes of the institution? If he was, then the parol contract made by him must amount to an express promise of the corporation, and lay a foundation for an action. But although he was the agent, if he went beyond the scope of his authority, although a loss may be sustained by those who confided in him, his engagements are not, either express or implied promises on the part of the corporation, and they present no foundation for maintaining an action. But, it is not my province to decide the question of law, whether the plaintiffs could have obtained judgment at law, if the claim had been resisted, and the attention of the court called to the subject. I, therefore, proceed to the second question.

Is the authority given such as to justify the entering of the judgment?

In examining this point, I have to disclaim all authority to interfere with the judgments of a court of law; except on equitable principles; where the court directs a judgment, it is not my province to say they were correct, or that they erred. The case under consideration is not of that character. An authority to appear

to a suit against a corporation can only be communicated, by the corporate seal, is a proposition not to be controverted. The authority under which the appearance is entered need not be made a part of the record to sustain the judgment. In favour of the judgment, the court will presume the authority to appear was complete. These principles are recognized by the Court of Appeals in the case of *McMecken v. The Mayor, &c. of Baltimore.* (e) But the court cannot presume against the fact; and, if the authority given did not justify the appearance and judgment, the judgment cannot be sustained. If the process of the court of law to enforce the payment of such a judgment, cannot be restrained by this tribunal, the party is remediless. For, if the property taken in virtue of an execution founded on such a judgment is sold; except it was purchased by the plaintiff in the cause, the right of the defendant to the property is gone by the sale, notwithstanding the judgment should be reversed.

There are two objections to the judgment under consideration, each of which appear fatal. *First*, the authority under which the appearance was entered does appear, and the corporate seal is not annexed. *Second*, *Richard Caton* describes himself, not as the president of *The Cape Sable Company*, the corporate name, but as 'Presd't of the A. and Copp's Co. of Cape Sable,' a name, not only in words, but in substance, essentially different. By the act of incorporation, the company, with the consent of three-fourths of the stockholders holding three-fourths of the shares, may engage in other manufactures besides alum and copperas.

To recur again to the merits of the case. The money, the answers allege, was loaned in consequence of *Caton's* pledging, or agreeing to pledge the funds. The answers state he was duly authorized. But how he was authorized; in what manner the authority was given, is not communicated.

But, it has been contended in the argument on behalf of the defendants, that as it is stated by the answer, that *Caton* was authorized, that, that is sufficient. If, as it was said, it was necessary for three-fourths of the stockholders holding three-fourths of the shares to communicate the authority, then, as he could not have been authorized without such consent, their consent was given; therefore, the answer, in effect, declares such consent was obtained. If the authority could be given, with the consent of less than

(e) 2 H. & G. 41.

three-fourths, then, in stating the authority was given, the answer, in substance, does not undertake to allege, that the consent of the three-fourths was obtained. That is, in other words, the defendants would not, or could not state how the authority was given.

The act of incorporation is explicit, that the property shall not be mortgaged or sold without the assent of three-fourths of the stockholders holding three-fourths of the stock. The complainants assert, they did not consent, and they represent an interest larger than one-fourth. The defendants, in their answer, do not assert, that they, the complainants, ever did assent; or that they had any knowledge of the transactions between them and *Caton*, who undertook to pledge the funds; an undertaking beyond his power; and, which the defendants would have discovered, had they examined the charter. They were bound, in regard to their own interests, to have examined it, and having done so, and perceived the guarded manner in which the affairs of the corporation were to be conducted, and the restrictions imposed against selling or pledging, before they advanced their money to *Caton*, they should have seen the authority under which they acted. It was useless in the extreme to guard against mortgages and sales, if the president of the corporation, at his will and pleasure, had power to go into a court of justice and confess judgment to any amount. The judgments themselves bound the property; and a sale might be effected under a *fiery facias* issued thereon, and of course a mortgage or pledge, and consequent sale obtained.

On the part of the defendants it is said the want of an answer by *Caton* should not affect their interests; the complainants, and not them, should compel him to answer. What effect *Caton's* answer may have, it is impossible to say; nor must the complainants, from this time forward, cease to use the necessary process of the court to compel an answer; should unnecessary delay take place, an order, perhaps, different from the one about to be passed, may be made. On the whole the injunction is continued until final hearing or further order.

Robert and *John Oliver*, by their petition, stated, that the injunction had been issued without requiring the plaintiffs to give bond to abide the final decision on the bill, which ought to have been required before the injunction issued. They therefore prayed, that these plaintiffs might be ordered to give bond by an appointed time, or that the injunction be dissolved, &c. Whereupon it was,

on the 10th of December, 1823, *Ordered*, that the plaintiffs give bond as prayed, or shew cause on the 10th of January then next; *Provided*, that notice be given, &c.

7th May, 1824.—JOHNSON, *Chancellor*.—On the 21st of April last, after an attentive examination of the arguments *pro* and *con*, on the motion to dissolve the injunction, which had been issued in this cause, and after a minute and particular scrutiny, and the best reflections I could bestow on the subject, the injunction was continued, for the reasons then given in detail. At the last term, and when the case stood in the same situation as at the former argument, my attention has again been called to the subject, and the cause elaborately argued, relying on the part of the defendants, that the injunction ought not to have issued without bond and security; and that it should be dissolved, unless such bond should be given by a prescribed day.

On the part of the complainants it was insisted, that, supposing a bond to have been necessary, yet as the injunction was obtained without one, that the irregularity of issuing it was waived by the answer. I have again considered the case and see no reason to retract from the opinion pronounced on the former occasion; nor can I discover any error in granting the injunction without bond; if, in any case a bond should be dispensed with, this is one; and the decisions of my predecessors in office fully warranted the issuing of this injunction. The time, the manner, the effect, and the immediate ruinous consequences from the hasty and unwarranted judgment demanded the immediate interposition of this court; and, unless compelled to demand an injunction bond, it should be dispensed with.

In the case of *Hampsen v. Edelin*, (f) no bond was given to prosecute the injunction that issued. In that case, an execution was laid on a piece of land, that the complainant had purchased and obtained a bond for the conveyance of, prior to the rendition of the judgment. Also in the case of *Stewart v. Yates*, (g) an

(f) 2 H. & J. 64.

(g) *STEWART v. YATES*.—This bill was filed, on the 22d of October, 1817, by William Stewart against John Yates, Thomas Armatt, William Brogden, Lewis Duvall, John N. Watkins, and The President, Directors and Company of The Farmers' Bank of Maryland. The bill states, that some time previous to the 23d of March, 1797, a purchase was made of Allen Quynn by Joseph Watkins, of a tract of land which was conveyed to him accordingly, with an agreement, that Watkins should afterwards convey to the plaintiff a certain portion of it containing about sixty-three acres, which had been previously set apart for him; and which he

injunction issued, without bond, to prevent land from being sold under an execution, founded on a judgment against the legal

paid for shortly thereafter; that a deed for the same was soon after prepared, but not executed by Watkins, owing to his negligence, until the 5th of March, 1812; although the plaintiff had, many years before, paid the purchase money; and had, at that time, been in actual possession of the land fourteen or fifteen years. That about the month of February, 1804, the plaintiff purchased of Watkins ninety acres more of the same tract of land, and also a small parcel of another tract, for which the plaintiff agreed to pay five hundred pounds; the whole of which had been long since paid; but for which land he had not obtained a deed until the 5th of March, 1812; although he had had possession thereof, under the contract, seven or eight years. That after the plaintiff had purchased the last parcel of said land, received the possession and paid the purchase money, two several judgments were recovered by the defendant Yates for the use of the defendant Armatt against the said Joseph Watkins; which judgments appear to have been assigned to the defendant Duvall, by him to the defendant John N. Watkins, and by him to the defendant the Bank. That upon the other judgment obtained in October, 1802, by the state for the use of the defendant Brogden, considerable payments had been made, which had not been credited. And that executions had been issued upon those judgments, and laid upon the lands so purchased by the plaintiff. Whereupon this bill prayed for an injunction to stay further proceedings on the said executions so far as related to the said lands; and for general relief, &c.

22d October, 1817.—KILTY, *Chancellor*.—The bill is not sworn to, and there is no bond. These defects might be supplied; but, on perusing the bill, I am not satisfied, that an injunction ought to be issued. It does not appear that the complainant has any interest in the lands against that of creditors; or that it is competent for him to enquire into the sum due. If, on the bill being sworn to and bond executed, the counsel should file any observations in writing they will be considered.

Immediately after which the bill was sworn to; and the plaintiff's solicitor, in his remarks filed as suggested, referred to and relied upon the case of *Hampsen v. Edelin*, 2 H. & J. 64, in which no bond was required; and he observed, that this was not an application by a defendant at law to stay proceedings on a judgment against him; but to prevent a sale of particular land, because it did not belong to the defendant at law. Upon which the bill was again submitted.

29th October, 1817.—KILTY, *Chancellor*.—Since the order of the 22d instant, remarks in writing have been made by the counsel for the complainant, and the case of *Hampsen v. Edelin* in this court has been referred to. No bond appears to have been required in that case. Whereupon is is *Ordered*, that *subpœna* and injunction issue as prayed.

It is to be observed, however, that one of the judgments exhibited was obtained in 1802, before the last purchase of the land; but supposing the complainant to have an equitable interest therein, the other circumstances, stated in the bill, may be sufficient grounds for the injunction, which can be further considered at the hearing of a motion for dissolution.

CROSS v. MULLIKIN.—This bill was filed on the 2d of April, 1824, by Thomas Cross against Benjamin H. Mullikin, William Gwynn of John, William Wilkins, Joseph Wilkins, and George Howard. The bill, after setting forth the facts and circumstances as stated in the following opinion of the Chancellor, prayed for special

holder of the estate. In those cases, as insisted on by the defendant's counsel in this case, the injunctions were obtained by him

and general relief; and for an injunction to stay all further proceedings on the said judgment and execution, and also commanding the said Mullikin and Gwynn not to receive the amount of the said judgment until the further order of the court.

To this bill was subjoined an affidavit, made by the plaintiff before a justice of the peace, of the truth of the facts therein set forth in the usual form. Upon which the bill was submitted to the Chancellor.

2d April, 1824.—JOHNSON, Chancellor.—Benjamin H. Mullikin having endorsed the notes of George Howard, as well as notes of Howard and Beatty, his deceased partner, to a considerable amount, to indemnify him, on the 25th of September, 1817, Howard gave Mullikin a mortgage on a tract of land called Joseph's Gift, the conveyance to be avoided on the notes, he had or should endorse, being taken up by Howard, or on his paying to Mullikin whatever sum he might have to pay, in consequence of his indemnity. The notes were not returned by the principal debtors, and Mullikin had to pay a very considerable sum of money.

William Wilkins & Co. became the endorsers of the notes of Mullikin to a large amount; to indemnify them, Mullikin conveyed the property, the title to which he had acquired by the mortgage from Howard, subject to be defeated on Mullikin's notes, that were or should be endorsed by Wilkins & Co., being taken up by Mullikin, or on his paying to Wilkins & Co. the amount they should have paid in consequence of their endorsements. The sum of nine thousand dollars appears to have been paid by them, thereby making them the creditors of Mullikin to that extent, the payment whereof was secured by the conveyance to them of the mortgage from Howard to Mullikin.

Some time after these transfers, and long after they had been duly recorded, Mullikin obtained a judgment, in Anne Arundel County Court, against Howard for \$21,786. The judgment was entered on the 28th of October, 1823. Previous to the rendition of the judgment, Howard obtained the benefit of the insolvent laws of this state; and the judgment appears to be subject to the legal effect of the discharge. On the 16th of April, 1823, Wilkins & Co., in consideration of \$10,000, conveyed all their interest in the mortgaged premises to Thomas Cross, the complainant, which conveyance was recorded on the 21st of the same month. Subsequently to the rendition of the judgment, it was entered on the docket of the court in which it was obtained, for the use of William Gwynn of John, one of the defendants.

George Howard, by deeds executed and recorded, has conveyed to the complainant the personal property Howard acquired since his discharge under the insolvent law. Subsequently to all the transfers a *fieri facias* issued on the judgment, which has been laid on the mortgaged premises, as well as on the personal property; and an application is made for an injunction to prevent the sale of the sheriff. No bond is filed for the prosecution of the injunction.

The first question which presents itself, is, has the complainant presented an equitable foundation for the interposition of this court? *Second*, if he has, can it be obtained without an injunction bond?

It appears by an exception taken to the opinion of the court, on the trial of the cause of Mullikin v. Howard, that the claim by Mullikin on Howard was not merged by the mortgage given by the latter to the former; but existed independent of the mortgage, and the right to recover by a judgment at law remained in Mullikin, no matter to whom he transferred the mortgaged premises. No doubt, if I may be permitted to express a legal opinion, in this, the court was perfectly correct; otherwise,

who was no party to the suits at law, and only went to protect particular property from the executions.

in the event of that property proving deficient, no redress could be had to recover the deficiency if Howard was ever able to meet it. To say the mortgage merged the claim at law would, in effect, be determining the mortgage itself a nullity; for, when it was given no claim existed; the object of the deed was to secure the payment to Mullikin of whatever sum he might pay, not that he had paid; it was entirely prospective. But although the legal right remained in Mullikin to obtain a judgment for the money paid by him, it will not follow, that he could not part with his right to receive the money when the judgment was obtained.

All that Mullikin could do was to transfer the property, mortgaged to him by Howard, subject as between him, his assignee and Howard, to the proviso of Howard's deed. But, as between Mullikin and his assignees Wilkins & Co., subject to the proviso contained in his, Mullikin's, deed to them. Of course, all the interest Wilkins & Co. obtained to secure their debt was the extent of Mullikin's claim on Howard; if that were less than was due to Wilkins & Co., they would have to resort to other funds; if none, must have borne the loss. If their claim, as appears to be the case, were less than the debt due from Howard, and the mortgaged premises were adequate, then the balance would have belonged to, and was subject to Mullikin's disposal. But, as he had transferred to Wilkins & Co. the claim he had on Howard, to the extent of the claim on him, it was not in his power, equitably, to transfer the whole claim to another person.

Wilkins & Co. appear to have absolutely conveyed to the complainant all their interest; and yet his own property, in the possession of Howard, has been taken in execution to be sold to raise money to be paid to William Gwynn. If Howard himself was able and willing to pay to Mullikin or Gwynn the whole amount of the judgment, on an application to this court, he would be prevented, and only permitted to pay the balance after discharging the debt that was due to Wilkins & Co., or he would be directed to bring it into this court, when a similar distribution would be made.

In respect to the bond. This cause cannot be distinguished from that of *Stewart v. Yates*, (*ante* 615,) determined by my predecessor, founded on a prior decision. There an injunction issued to prevent property from being sold under a *fiери facias* issued on a judgment obtained against a third person who held the legal estate in the property intended to be sold, the equitable title being in the complainant. Here an attempt is made against the consent of him who has a right to the whole money to be raised, supposing it not to extend to the debt that was due to Wilkins & Co., to sell his own property. If the complainant has not the legal control of the judgment, he has an equitable, to the extent mentioned, supposing the transfers to him, that are exhibited with the bill to be *bona fide*; and, *prima facie* they are so considered; and therefore the injunction prayed for ought to issue; and the register is directed to issue it as prayed.

After which the defendant Mullikin filed his answer, and moved to dissolve the injunction. Upon consideration of which, on the first of January, 1825, the injunction was continued. After which the defendant Gwynn put in his answer, and thereon moved to dissolve; but upon consideration thereof, the injunction was, on the 30th of March, 1825, continued. After which the other defendants having answered, the motion to dissolve was again renewed; but on this third consideration, upon the answers of all the defendants, the injunction was, on the 2d of November, 1825, again continued. After which a commission was issued, and testimony taken. And at the final hearing on the 24th of July, 1828, the injunction was dissolved, and the bill dismissed with costs.

It is very true, that those injunctions were intended to free particular property from the executions ; and the reasons are assigned in the bills why such property should not be liable to the executions ; and no one, for a moment, could doubt, but that the same grounds applicable to the whole property, real and personal, which was once completely owned by the defendant at law, would be protected, if, prior to the judgment, as applicable to the real, or prior to the *feri facias*, as applicable to the personal, he had parted with the same, so as to vest the equitable interest in him, or them, who should claim the protection of a court of equity. The principle on which those injunctions issued was, that the party applying for them was the equitable owner of the property which was attempted to be sold to pay the debts of a person who, before the judgments, had *bona fide* parted with the property. In those cases, it was contended, that the complainants were not, at law, parties ; but here, as the complainants claim in virtue of their interest in *The Cape Sable Company*, against whom the judgment was rendered, they were parties to that cause, and as such were not entitled to an injunction without bond.

It is manifest, from the exhibits filed with the bill, that in point of fact the complainants were ignorant of the proceedings on which the judgment was rendered ; and, for the reasons disclosed in the former opinion, those proceedings did not authorize the judgment ; and none would have been obtained, if opposed by those persons holding one-third of the stock. If it be conceded, that, technically speaking, at law, all composing the company when a suit is fairly brought are parties to that suit ; yet, it will not follow, that a court of equity is concluded by the judgment, or precluded from examining into the real character of the transaction, and applying the equitable relief the party is entitled. If, in ordinary corporations, the whole body is represented by the head ; yet, it is competent for the Legislature, in forming a new body corporate, to restrict the powers of the president, and he can only move within his restrictions ; and, if he attempts to go beyond them, and without the power of a court of law to grant redress, it is competent for this tribunal to interpose. When the act of incorporation restricted the power to sell and dispose of the property, or mortgage the whole, or any part thereof, to the previous consent of three-fourths of the stockholders holding three-fourths of the shares, unless the act is rendered totally nugatory, so far as relates to the restriction, it must prevent the president from voluntarily going

into a court of law to confess a judgment, and thereby bind the property more effectually than a mortgage.

The present complainants never had an opportunity to resist the judgment; the manner it was rendered precluded them from asserting their rights, they had no more opportunity to resist the entering of the judgment than those whose equitable interests was protected by this court, from judgment at law over which they had no power or control. It cannot be supposed, that if this court can protect an equitable interest from a judgment at law, it is precluded from giving the same protection to a legal interest standing in need of the same protection. In the case cited, as determined by *Chancellor HANSON*, the legal interest in the land was vested in the complainant when the injunction issued; he obtained a conveyance, founded on an equitable title, subsequent to the judgment; and, of course, held the legal title in the land to which the injunction applied.

The injunction will continue until final hearing or further order. If a speedy decision on the merits is desirable, on the answer of *Caton* coming in, the cause may be ready for final hearing.

After which these plaintiffs, on the 10th of June, 1824, filed a third bill against *The Cape Sable Company*, *Richard Caton*, *Robert Oliver*, *Charles Carroll of Carrollton*, *Robert G. Harper*, *George Slye*, *Samuel C. Love*, *Luke W. Barber* and *Thomas Barber*; in which they refer to and pray to have their two former bills made parts of this. And they state, that since the judgment which had been obtained in Anne Arundel County Court, on the 9th of December, 1822, by *Robert* and *John Oliver*, *John* had died; that this defendant *Robert Oliver*, his surviving partner, on the 26th of May, 1824, by a combination with this body politic and its president *Harper*, and with the defendant *Caton*, had, with intent to defraud these plaintiffs, and in order to evade the injunction heretofore issued, caused a judgment to be confessed in Baltimore County Court against *The Cape Sable Company* in favour of *Robert Oliver* for the same demand for which the former judgment had been rendered in Anne Arundel County Court; upon which judgment, of Baltimore County Court, a writ of *fieri facias* was taken out, before any execution had been issued and returned *nulla bona* to that court, and directed to the sheriff of Anne Arundel; which was promptly levied upon all the visible property of *The Cape Sable Company*; which was immediately advertised for sale; that although

this writ of *fieri facias* was sent from Baltimore to Anne Arundel by consent; yet no such consent of *The Cape Sable Company* could give jurisdiction to a court, where none such was given but in a prescribed manner. That at the March term, in the year 1822, of the Baltimore County Court, these defendants *Luke W. Barber*, *Thomas Barber*, *George Slye*, and *Samuel C. Love* severally obtained judgments against *The Cape Sable Company*; upon each of which judgments writs of *fieri facias* were issued and returned *nulla bona* to the September term of that year of the same court. After which, on the 22d of January, 1823, writs of *fieri facias* issued on the same judgments to the sheriff of Anne Arundel; which were returned *nulla bona* to the April term of the same year of the court of that county. That no further or other process was issued thereon until the first day of June, 1824; when, by consent, without any *scire facias* to revive them, writs of *fieri facias* were taken out from Anne Arundel County Court on each of them, and levied upon all the property of *The Cape Sable Company*; which was advertised to be sold on the same day appointed for the sale under *Oliver's* execution; that all four of these last mentioned judgments had been satisfied by money advanced by the defendant *Carroll* to the defendant *Harper*, who afterwards assigned them to the defendant as a security for the money so lent and advanced by him; that on the 4th of June, 1824, after the property of *The Cape Sable Company* had been actually taken in execution and advertised for sale, actions of debt on these same judgments were docketed by consent, and judgments confessed thereon in Baltimore County Court for the use of the defendant *Carroll*; that although these latter judgments may be void; yet the property of the *The Cape Sable Company*, in which these plaintiffs have so large an interest, cannot be thus subjected at law to a double execution for the same debts; and that the sole object of all these proceedings has been to deprive these plaintiffs of their rights, and to exclude them from all connexion with *The Cape Sable Company* as legal and equitable stockholders therein. Whereupon the bill prayed for an injunction to stay the proceedings at law, &c. Which was granted accordingly.

Richard Caton, by his answer to this bill, admitted that the proceedings at law had been had as stated; but averred, that they were all *bona fide*, and that there was no fraudulent intention on the part of any of the defendants, &c. The defendants *Robert G. Harper* and *The Cape Sable Company* answered to the same effect,

and he averred, that the judgments of *Slye, Love*, and the *Barbers*, never had been satisfied, and that they had been regularly assigned to the defendant *Carroll* for a valuable consideration. The defendant *Robert Oliver*, by his answer, states and avers, that the amount for which he had obtained judgments against *The Cape Sable Company* in Anne Arundel County Court was for money lent and actually applied to the use of that body politic; that the decisions of this court of the 21st of April, 1823, and the 7th of May, 1824, so vitally attacked that judgment as perfectly to nullify it; and that therefore, and with a view, in the most effectual manner, to correct and remove those great informalities which had been pointed out, and were considered as so fatal to that judgment, the suit was instituted and a judgment obtained in Baltimore County Court, on the 26th of May, 1824, for the same debt, &c. as alleged by the plaintiff. This defendant denies all fraud, &c. The defendant *Carroll*, in his answer states, that he was applied to by the defendant *Harper* and others for the loan of money to relieve the embarrassments of *The Cape Sable Company*; and that he, after some negotiation, agreed to lend his money, and took as a security for the money so lent to that body politic an assignment of the judgments of *Slye, Love*, and the *Barbers*, which were then and yet remain in full force, and wholly unsatisfied; and that he caused writs of *fiery facias* to be issued on them, as stated in the bill; that as to the judgments which appear to have been confessed in actions of debt on the judgments originally of *Slye, Love*, and the *Barbers*, in Baltimore County Court on the 4th of June, 1824, they were obtained in consequence of a misunderstanding of his attorney, and because he was ignorant, that executions had previously issued to Anne Arundel County; but those judgments will be vacated, or otherwise disposed of so as to keep them harmless, in such manner as the Baltimore County Court may, at its next term, direct. This defendant alleges, that he is ignorant of the other matters stated in the bill; and he denies all fraud, &c.

Upon these answers the case was brought before the court on a motion to dissolve the injunction.

10th November, 1824.—BLAND, *Chancellor*.—The motion to dissolve the injunction standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

This case has been gathered into the shape in which it is now presented to the court in three separate parcels, commenced at

three distinct periods. The first is that belonging to the bill filed on the 6th of August, 1822; the second is that of the bill of the 4th of January, 1823; and the last is that which has been accumulated under the bill introduced to the court on the 10th of June, 1824. On each an injunction has been awarded; and all have been combined, or in a manner consolidated by each of the latter bills, invoking the prior bills and proceedings into itself. The object of them all is to establish and protect the interest, which *Ridout* and *Jubere* claim, as trustees, for the use of *John Gibson's* children, in the stock of *The Cape Sable Company*. The present motion is to obtain a dissolution of the injunction which has been granted on the last of these bills.

Upon a careful consideration of all the facts and circumstances which gave rise to the equity upon which this injunction was granted, it appears, that the answers of the defendants, who make the motion, have not so denied them as to displace any material part of that foundation of fact upon which this injunction rests. (*h*) But it is a general rule, that where there are two or more defendants, a motion to dissolve cannot be heard until the answers of all of them come in. (*i*) The *Barbers*, *Slye*, and *Love*, have neither of them yet answered; and it is highly probable, that they may disclose facts of the greatest importance upon a motion of this kind.

It is therefore *Ordered*, that the injunction heretofore issued in this case, be continued until the final hearing or further order.

After which the defendants *Thomas Barber*, *George Slye*, *Samuel C. Love*, and *Luke Barber*, put in their answers, in which they state, that their several judgments had been assigned, for a valuable consideration, before they were satisfied, to the defendant *Carroll*; and they denied all fraud, &c. It was agreed, that the answer filed by *Richard Caton* on the 23d of June, 1824, to the bill filed on the 10th of June, 1824, should be received as his answer to the bill filed on the 4th of January, 1823. And also, that the answer of *The Cape Sable Company*, filed on the 24th of June, 1824, to the bill filed on the 10th of June, 1824, should be received as their answer to the bill filed on the 4th of January, 1823. To all these answers the plaintiffs put in a general replication, and commissions were issued and testimony taken. The Chancellor,

(*h*) *Salmon v. Clagett*, ante 162.—(*i*) *Eden. Inj.* 66; *Jones v. Magill*, 1 *Bland*, 177.

with a reservation of his determination of the matters of the two last bills, passed the following decree on the bill filed on the sixth of August, 1822, and the answers thereto.

22d May, 1827.—BLAND, *Chancellor*.—*Decreed*, that the parties account with each other concerning the matters and transactions in the proceedings mentioned: that the auditor state the account relative thereto on the evidence in the case, and such other evidence as the parties may produce to him on notice, as usual in such cases. The account to be returned to this court for further order, and subject to the exceptions of the parties.

The auditor made and filed on the 8th of March, 1828, a report, dated on the 29th of February, 1828, in which he says, that he had examined the proceedings and the voluminous documents produced on the part of *The Cape Sable Company*; and that it fully appears, that the necessary expenditures on account of the company have greatly exceeded the moneys received for stock, materials sold, &c.; and therefore, that there is nothing due for dividends or profits on the shares claimed by the complainants. The accompanying statements shew, that the company is now in debt to the amount of \$34,294 91, exclusive of interest. Those statements exhibit a result different in some degree from that of the accounts heretofore prepared and filed on behalf of the defendants. But this difference is to be attributed chiefly to the different forms in which the accounts are prepared. There may be some differences in the details; but if such exist, they are of trifling amount, and cannot affect the substantial result. The auditor has considered it unnecessary to institute a minute comparison between the two statements; because, after deducting all questionable charges, if such exist, the company would remain in debt to an amount greatly exceeding the value of all their property. The bill contains very grave charges against the defendants; impeaching their motives, and mode of managing the affairs, and in particular, the pecuniary concerns of the company. And the auditor has, in his character of counsel for the complainants, frequently insisted upon those charges. It is due to the defendants and himself to declare, that an investigation of the accounts has satisfied him, that all the moneys received for the use of the company have been promptly and properly applied, by its agents, to the uses of the company; and that those agents have been frequently in advance to a large

amount; and from time to time incurred heavy responsibilities in order to carry on the works.

Annexed to this report there was an agreement, signed by the solicitors of the parties, in which it is said, that it is agreed, that the injunctions heretofore issued in the cases of the same plaintiffs against *Robert Oliver* and others, be dissolved, and all the bills be dismissed. The question of costs alone is submitted to the Chancellor without argument.

8th March, 1828.—BLAND, Chancellor.—The said case, the bill filed on the 6th of August, 1822, together with the two others mentioned in the agreement of the parties this day filed, having been submitted according to the terms of the said agreement; and it appearing, that the complainants had in fact no just cause for filing the said bills.

It is thereupon *Decreed*, that the injunctions heretofore awarded in the said several cases, be and the same are hereby dissolved. And it is further *Decreed*, that the several bills of complaint of the said complainants, be and they are hereby dismissed with costs, to be taxed by the register.

Soon after which the plaintiffs, by their petition, stated, that their three bills and cases, though not properly consolidated, relate to the same subject matter, are intimately connected, and have been prosecuted together. They were heard together; and the first case referred to the auditor with directions to state an account, and the decision of the others reserved. That the agreement, under which the decree of the 8th instant was passed, was hastily and inadvertently entered into by one of the solicitors of the plaintiffs; that, in consequence of that decree, executions may shortly be issued against the property of *The Cape Sable Company*, in which these plaintiffs are concerned, and their interests sacrificed. Whereupon they prayed, that those cases might be reinstated, &c.

14th March, 1828.—BLAND, Chancellor.—On consideration of the foregoing petition, and the representation of the solicitors; it is *Ordered*, that the said decree of the eighth instant be, and the same is hereby suspended; and the said injunctions heretofore granted in the said cases, are reinstated until further order. *Provided*, that no cause be shewn to the contrary on the fourth day of April next, or any earlier day, that may be agreed on between the solicitors of the parties. *And provided*, that a copy of this order, together with a copy of the foregoing petition, be served on the

said defendants or their solicitors, on or before the twenty-first day of the present month.

Afterwards the parties to these three combined cases; that is to say, the bill filed on the 6th of August, 1822; the bill filed on the 4th of January, 1823; and that filed on the 10th of June, 1824, submitted them all together on the following agreement: 'It is agreed in the above cases, that a decree shall be passed for the sale of the property of *The Cape Sable Company*, mentioned in the proceedings in said cases, by trustees to be appointed in the usual form and terms; and that *Samuel Moale* and *Charles F. Mayer* be the trustees for making said sale. And that the proceeds of said sale shall be distributed by the court according to the rights of the parties. And that the court pass an order notifying creditors to exhibit their claims against *The Cape Sable Company* in Chancery in order to such satisfaction as the court may determine them to be entitled to out of the said proceeds. It is provided, however, that if the said *Robert Oliver* shall become the purchaser of the said property, or of any part of it, the amount of his and *Charles Carroll's* alleged judgments against *The Cape Sable Company* may be retained in his hands, without interest, until a final distribution of the proceeds of sale aforesaid, shall be ordered by this court; the said *Robert Oliver* giving bond and security, however, for the amounts retained by him as aforesaid; and interest ceasing from the time of said retention on the claims that said *Oliver* and *Carroll* respectively may have against *The Cape Sable Company*. It is further agreed, that the terms of said sale shall be, that five thousand dollars, part of the purchase money, shall be paid in ninety days; and the residue in equal instalments in one, two, three, four, and five years, from the day of sale, with interest from said day. For all which payments promissory notes shall be given with surety, to be approved by the trustees. It is further agreed, that the sale shall take place on or before the first of July, 1828; and that six weeks notice of such sale shall be given. It is further agreed, that each of the said parties shall have the right to appeal from any order or decree of the Chancellor respecting the distribution of the proceeds.'

5th April, 1828.—BLAND, Chancellor.—The said cases standing ready for hearing, and being submitted, it is, with the assent of the parties in writing, filed. Decreed, that the property of *The Cape Sable Company*, mentioned in the proceedings, be sold; and

that *Samuel Moale* and *Charles F. Mayer* be appointed trustees to make the sale, &c. And, in pursuance of the said agreement, it is further *Decreed*, that if the said *Robert Oliver* shall become the purchaser, he may retain, &c. And the trustees at the time of advertising the said sale, shall also give notice to the creditors of *The Cape Sable Company*, to exhibit their claims, with the vouchers thereof, in the Chancery Office, within six months from the day of sale.

It appears, that the plaintiff *Addison Ridout* had died some time previous to the passing of this decree; but as his interest survived to the parties before the court, the case proceeded in the name of *Joseph Jubere*. But *James Jubert*, the other trustee, one of the plaintiffs by whom the suit had been hitherto prosecuted by the name of *Joseph Jubere*, by his petition, now stated, that he never, until lately, heard of his having been constituted a trustee, or of the suit having been instituted in his name; that he had never at any time, or in any way, consented to act as trustee, or to the bringing, or prosecuting of this suit. Whereupon he prayed to be discharged, &c. The solicitors of the plaintiffs assented to the prayer of this petition, and recommended *Augustus E. Addison* to take his place.

29th June, 1828.—BLAND, *Chancellor*.—On consideration of the foregoing petition and the consent of the complainant's solicitor this day submitted; it is *Ordered*, that the said bill of complaint, as to the said *James Jubert*, who, as is alleged, had instituted the said suit by the name of *Joseph Jubere*, be and the same is hereby dismissed with costs. And it is further *Ordered*, that the said *Augustus E. Addison* be and he is hereby appointed trustee in the place and stead of the said *James Jubert*, who sued by the name of *Joseph Jubere*, and that the said *Augustus E. Addison* be substituted for, and be considered as standing in the place of the said *Jubere*, as trustee in the said bill of complaint and all the proceedings of the said suit.

The trustees *Moale* and *Mayer* reported, that they had, on the 30th of June, 1828, sold the whole of the real and personal estate of *The Cape Sable Company* in pursuance of the decree; and that *Robert Oliver* was the purchaser thereof for the sum of \$24,000, with a reservation of the claim of *Philip G. Lechleitner* of a lease and the value of certain fixtures to be allowed to him, and de-

ducted from the amount of sales. The real estate is described by these trustees in their report, as consisting of several tracts and parts of tracts of land as therein named, containing about one thousand and ten acres, with a right of mines and minerals in about eight hundred and seventy-six acres of other lands, all lying in Anne Arundel county; and the personal estate they describe as consisting of slaves, horses, carts, wagons, implements used in the manufactories, &c. But they do not say, or in any manner intimate, that the real estate was sold, or even offered for sale separately from the personalty; nor do they furnish any means whereby the separate value of the real and of the personal estate may be ascertained, or how much of the purchase money was given for the one or the other. These trustees also report, that they had given notice, as directed, to the creditors of *The Cape Sable Company*, to bring into the Chancery Office the vouchers of their claims, within six months from the day of sale. This sale was finally ratified on the 23d of September, 1828.

On the 6th of October, 1828, *Philip G. Lechleitner*, for himself and in behalf of and to the use of *J. J. Vanderkemp*, executor of *Paul Busti*, deceased, filed his petition and claim, in which he states, that he was for a number of years employed by *The Cape Sable Company* as agent and superintendent of its manufactories and concerns; that in the course of his agency he had, as appeared by his account, which he was ready and would be able to verify, large sums of money due to him, amounting, on the 10th of August, 1824, to the sum of \$27,042 45; which, with interest on the several items, was still due; that he had assigned this claim against *The Cape Sable Company* to the late *Paul Busti* to secure him for the amount which he, *Lechleitner*, owed him, *Busti*. Whereupon he prayed, that his claim might be adjusted and allowed accordingly, &c.

Among the vouchers produced and admitted in evidence, in relation to this claim of *Philip G. Lechleitner*, is an agreement under seal, made and entered into on the 25th of September, 1813, by *Richard Caton*, *John Gibson*, *Robert G. Harper* and *Robert Patterson* of the first part, and *Philip G. Lechleitner* and *Gerard Troost* on the second part, for the establishment and carrying on of works for making copperas and alum, or either of them, on lands in Anne Arundel county, lately conveyed by the said *John Gibson* to *Charles Carroll of Carrollton*, in trust for the use of the said *John Gibson*, *Richard Caton* and others. The partnership

formed under this agreement was to continue for ten years from the date thereof; and the mode in which the business of the concern was to be conducted; the capital to be furnished by the parties of the first and second part; and the terms and proportions in which the profits were to be divided between them, are all particularly specified in the contract itself.

On the 22d of October, 1828, *William O'Hara* filed his petition, in which he stated, that during the term of his sheriffalty of Anne Arundel county, four writs of *fieri facias* from Anne Arundel County Court against *The Cape Sable Company*, one at the suit of *Samuel C. Love*, another at the suit of *George Slye*, a third at the suit of *Luke W. Barber*, and a fourth at the suit of *Thomas Barber*, with another writ of *fieri facias* from Baltimore County Court against *The Cape Sable Company*, at the suit of *Robert Oliver*, surviving partner of *John Oliver*, were delivered to him to be executed; that he levied them accordingly, and advertised the property of *The Cape Sable Company* so taken for sale; but was restrained from proceeding further by the injunction issued in this case; that afterwards, under the decree of this court, all the property of *The Cape Sable Company* was sold; and that his poundage fees have not yet been paid. Whereupon he prayed that they might be paid out of the proceeds of sale, &c.

5th November, 1828.—BLAND, Chancellor.—Ordered, that the matter of the foregoing petition stand for hearing on the fifth day of December next; provided that a copy of this order, together with a copy of the said petition, be served on the respective parties in this suit, or their solicitors, on or before the seventeenth day of the present month.

Copies having been served as required by this order, the matter was at the time appointed for the hearing brought before the court.

15th December, 1828.—BLAND, Chancellor.—The petition of *William O'Hara* standing ready for hearing, and his solicitor having been heard, and no one appearing for any of the parties, although notice had been given as required, the proceedings were read and considered.

It appears that the petitioner, as sheriff of Anne Arundel county, executed five writs of *fieri facias* against *The Cape Sable Company*. It is not shewn when any of these writs came to his hands. From his return it appears, that they were all laid together on certain real and personal property as per schedule; but on what day, is not said.

After these executions had been thus levied he was prevented from proceeding to make sale, by an injunction from this court obtained at the instance of these complainants; who represented and claimed the interest of one of the corporators of *The Cape Sable Company*, against all the plaintiffs and defendants in those writs of *fiery facias*. After which, and while the injunction was in full force, by a decree of this court, passed with the consent of all the parties to the suit, all the property of *The Cape Sable Company*, including the whole of that on which the executions had been levied, was directed to be sold, and the proceeds brought in to be distributed among the creditors and parties in proportion to their respective claims; and it has been sold accordingly.

The object of this petition is to recover the poundage fees to which the petitioner alleges he became entitled upon levying those executions.

It is perfectly clear, that a sheriff's right to poundage fees is a claim of a legal, not an equitable character. That he has a complete remedy at law, either by action, or by selling for the amount, by virtue of the execution that has been levied is certain, and admitted on all hands. The only doubt upon the subject, at common law, is, whether the plaintiff or the defendant is liable to him for them, in all or in what cases. But this sheriff has thought proper to present his claim for poundage fees to this court, in this case. It is, therefore, not only necessary, that he should establish his legal claim against one or other or all of these parties; but, that he should also shew why he should be indulged in bringing that legal claim here; and upon what ground or equitable bearing it is, that this court can allow itself to entertain jurisdiction of his case.

According to the common law, sheriffs were entitled to no fees whatever for executing a *fiery facias* or any other process. (*j*) But, in England, by an act of Parliament, passed in the year 1444, not applied here, some fees were allowed; (*k*) and by the statutes passed in the year 1587 and 1716, not adopted here, they were allowed a certain compensation for their trouble, graduated according to the amount directed to be raised by the execution, called poundages fees from the manner in which they are estimated; being so much per pound for the first hundred pounds; and so much less for every pound above that. (*l*) These statutes do not extend

(*j*) Co. Litt. 368; 2 Inst. 176, 210.—(*k*) 23 Hen. 6, c. 9; Kilty Rep. 227.—(*l*) 29 Eliz. c. 4; Kilty Rep. 85; 3 Geo. 1, c. 15, s. 16; Kilty Rep. 112.

to real executions, but only to executions in personal actions; and, therefore, the sheriff is, in England, allowed no poundage fees for executing a *habere facias possessionem*. (m) Nor do they embrace any case where money is raised by process of attachment for contempt, upon which no poundage fees can be charged. (n)

It would seem, that the sheriff's right to poundage fees accrues and is complete in all cases immediately that the writ is regularly executed; although no sale should be made; or the execution, because of some antecedent error should be quashed, or the suit should afterwards be compromised. (o) In strictness the sheriff should make a return of the whole sum produced by the sale, when the court will order it to be paid over, deducting the poundage; but where the sheriff has received the poundage fees to which he was legally entitled, he will be allowed to retain them. (p)

It has been urged, that the sheriff has a lien upon the property taken in execution, for his poundage fees. But it is no where directly said, that he has any such lien upon the property taken, either as against the plaintiff or the defendant; or that he has a right to hold it in any way until his fees are paid. Yet the allowance of such a lien, so far as it does not conflict with the rights of others, or that superintending control necessary to the due administration of justice would seem to be entirely reasonable, and sustainable upon principles analogous to those on which tradesmen and officers are allowed to have a lien upon property in their possession to secure the payment of their compensation and fees. But such a common law lien can only exist as an associate with possession; it begins and ends with possession. (q)

In this case the petitioner having been lawfully and completely divested of the possession of all the property he had taken in execution, he certainly can have no lien, according to the common law, upon it, or its proceeds, which the court is now about to distribute. And there is not the slightest ground to maintain, that a sheriff has a general lien on the property taken by him in execution, like the lien of the state upon the property of its debtors, or a plaintiff's judicial lien, as on a judgment at law, or a lien according to the civil law which follows the property on which it has

(m) *Peacock v. Harris*, 1 Salk. 331.—(n) *The King v. Palmer*, 2 East. 411.—(o) *Peacock v. Harris*, 1 Salk. 331; *Earle v. Plummer*, 1 Salk. 332; *Tyson v. Paske*, 2 Ld. Raym. 1212; *Alchin v. Wells*, 5 T. R. 470; *Rawstorne v. Wilkinson*, 2 Mau. & Sel. 256.—(p) *Com. Dig. tit. Viscount*, (F. 2.); *Woodgate v. Knatchbull*, 2 T. R. 148; *Alchin v. Wells*, 5 T. R. 470.—(q) *Selw. N. P.* 1286.

once fastened, through every change, and into all other hands. The petitioner, therefore, cannot sustain his pretensions upon any foundation of this kind. (r)

In the case under consideration, it is necessary to ascertain whether the plaintiffs or the defendants in these executions are liable to the sheriff for his poundage fees; and the principles upon which that liability rests.

This court has, in many instances, where it has money in its hands which it is about to pay over to a party who is liable no further than to the amount of such assets; or who is not a resident of the state, and within the reach of common law process, allowed a creditor of such a party to come in and obtain payment of his merely legal claim out of the assets or money of his debtor in this court. It seemed to be admitted, and indeed I do not see how it could be denied, that if the plaintiffs in those executions only were liable for these poundage fees, that there could not, from any thing alleged or shewn by the petitioner, be the slightest pretext for this court to entertain jurisdiction of his case, as he has against them an ample remedy at law. Because it is not shewn, that these proceeds are specifically bound for those fees, or that they are assets in respect of which those plaintiffs are chargeable; or that those plaintiffs are insolvent, or non-residents, and beyond the reach of ordinary common law process. There is, therefore, nothing in the petitioner's case which can entitle him to relief upon any such grounds as against the parties to this suit who are the plaintiffs in the executions.

But there are other kinds of executions which go against the person, or do not direct the property of the defendant to be taken and converted into money, on obeying which the sheriff becomes entitled to poundage fees. On taking the defendant into custody under a *capias ad satisfaciendum*, the sheriff becomes entitled to poundage fees on the whole amount. (s) And so, too, on executing a *levari facias*, an *elegit*, or a *liberate*, by virtue of which the property is not sold, but specifically delivered to the plaintiff in satisfaction of his claim. (t) In all these cases, as well as in all those where the execution, after it has been regularly levied, but, before a sale, has been countermanded; or has been quashed on account of some previous error in the proceedings; or the suit has

(r) *Ridgely v. Iglehart*, ante 540.—(s) *Peacock v. Harris*, 1 Salk. 331.—(t) *Tyson v. Paske*, 2 Ld. Raym. 1212.

been compromised, it has been made a question whether the plaintiff or the defendant was liable to the sheriff for his poundage fees.

The English statute which allows these fees says nothing which indicates an intention of the Legislature to impose a liability for them upon either the plaintiff or the defendant. It might be supposed, that in all cases where the amount of the plaintiff's claim was to be raised by a sale of the defendant's property, that the poundage fees should be included; and, consequently, that the defendant should be liable for them. And, that in all other cases where the plaintiff obtained satisfaction by having the defendant's body taken into custody; or by obtaining a delivery of his property, as no money passed through the sheriff's hands, from which he might deduct and retain his fees, the plaintiff should be held liable for them. But no such distinction has ever been made or recognized in any of the adjudged cases. On the contrary, it is said that in actions on simple contract, and judgments for a debt certain, the expenses of levying must be paid by the plaintiff, and not by the defendant. But if the judgment be for a penalty, the plaintiff has a right to receive the whole of his debt, independent of the expenses of the execution; and, in those cases, the defendant is liable for the whole amount of the poundage fees. (*u*)

It would seem, that in England sheriffs had taken advantage of the general phraseology of this statute of 1587, and charged poundage fees for the whole amount specified in the writ, in all cases, although there was, in truth, no more than a small balance due. To remedy this grievance, another statute was passed in the year 1716, requiring the sum really due in all cases to be endorsed on the back of the writ, on which amount, and no more, poundage fees were to be allowed. (*w*)

It appears, that one of the causes which accelerated and aggravated the war of independence in this state was an angry controversy which had arisen between the last Proprietary governors and the people as to the right to fix and regulate officers' fees; (*x*) in consequence of which the second General Assembly of the Republic, passed an act, even before the judicial department had been fully organized, to regulate such fees; in which, apparently in accordance with an English principle, (*y*) it declared, 'that officers'

(*u*) *Woodgate v. Knatchbull*, 2 T. R. 157.—(*w*) 3 Geo. 1, c. 15, s. 17; *Tidd's Prac.* 979.—(*x*) *Biography Sign. Ind. vit. Carroll*.—(*y*) 2 Inst. 533; *The Rendsberg*, 6 Rob. Adm. Rep. 162.

fees can be rated, regulated and established by act of Assembly only.' (z) This law was re-enacted; (a) and with some slight modifications again re-enacted into that law, the greater part of which still remains. (b) Two of the sections of the last of these acts are merely corresponding provisions of the early legislative enactments of the Republic upon the subject of poundage fees. The Provincial act of Assembly allowed fees to sheriffs upon executions similar to poundage fees; (c) but it is perfectly evident, from the language of the enactments of the Republic, that their provisions were taken from the English statutes of 1587 and 1716. And it is also remarkable, that all the acts of Assembly of Maryland, like the English statutes, have left it uncertain whether, in general, the plaintiff or the defendant was to be held liable for the poundage fees. A late act of Assembly has made some alterations as to the amount of these fees in suits at common law; but has not cleared away the obscurity of the previous laws upon the subject. (d)

It is certain, that upon the acts of Assembly a sheriff may maintain an action at law to recover his poundage fees. And it has been held, that the act of Assembly shews, that the *defendant* is liable for the poundage fees; that there is no instance of the plaintiff's receiving the poundage fees from the defendant; and that upon a *fieri facias* if goods are taken; and the debt is compromised, the sheriff can sell to the amount of the poundage fees; or that although he cannot detain the defendant in custody after he has paid the debt and costs; yet he may compel him to pay the poundage fees in the same manner he can any other fees. (e) It would seem, from what has been said in this case, to have been held to be a general rule, that the defendant was in all cases liable; yet, in a previous case, the defendant's liability appears to have been rested, in some degree, upon his promise to pay. (f) And in another case it appears, that the sheriff brought an action of assumpsit against the plaintiff, who had sued out an attachment,

(z) October, 1777, ch. 10; Declar. Rights, art. 12; 1650, ch. 25.—(a) October, 1778, ch. 17.—(b) November, 1779, ch. 25.—(c) 1763, ch. 18, s. 94.—(d) The act of Assembly authorizing the appointment of a messenger of this court, directs that his fees shall be paid by the party against whom the process issues.—1785, ch. 72, s. 32. And the same act which gives the Chancellor authority to issue a *fieri facias* (section 25,) in the direction that 'upon which there shall be the same proceedings as at law,' seems to be the only authority for charging poundage fees for levying a *fieri facias* from Chancery.—(e) November, 1779, ch. 25, s. 4 and 5; *Howard v. The Levy Court*, 1 H. & J. 566.—(f) *Stewart v. Dorsey*, 3 H. & McH. 401.

for poundage fees which he claimed for executing the writ upon the lands and tenements of the non-resident defendant, as fees allowed by the acts of Assembly. (g) Upon which it was held, that they must be paid by the person who issues the attachment. (h)

The result of these adjudications I take to be, that in all cases where the sheriff has taken the property of the defendant, or his person is within reach of the ordinary modes of proceeding, the defendant shall be held liable; but where he is beyond the reach of the process of the law, the plaintiff, who proceeds against him as an absentee or non-resident, shall be liable for the poundage fees.

On applying these principles to the case under consideration, it clearly follows, that this defendant *The Cape Sable Company* alone is liable at law to this sheriff for his poundage fees; the complete legal right to which, to the full amount of the debt actually due, accrued by the levy he made, as specified by his return of those writs. And it is equally evident, that but for the interposition of the injunction he might have sold the property of the company, at least, to the amount of his fees; or have enforced the payment of them in like manner as other fees. It was therefore the injunction of this court, which put a stop to all further proceedings at law, that prevented this sheriff from recovering his poundage fees by means of the executions he had levied. And it is by means of the decree of this court, under which all the property of this body politic has been sold; and which has reduced it to the condition of a mere penniless entity, utterly destitute of pecuniary ability to pay any claim, that this petitioner seems now to stand upon the eve of being deprived of the means of recovering his fees, in any manner whatever, unless by the aid of this court.

At common law a plaintiff might be prevented from obtaining the benefit of his judgment by a writ of error. Formerly there was always sued out along with a writ of error, a writ of *supersedeas*, which directed, 'that if the judgment be not executed before the writ of *supersedeas*, the sheriff is to stay from executing any process of execution until the writ of error is determined.' From which it appears, that if the execution had been begun before the *supersedeas* was delivered, the sheriff ought to proceed to complete

(g) November, 1779, ch. 25, s. 3; 1790, ch. 59, s. 2.—(h) *Maddox v. Cranch*, 4 H. & McH. 343.

it so far as he had gone; but not any further. That is, if he had taken the defendant into custody under a *capias ad satisfaciendum* he might detain him; or if he had levied a *fieri facias* he might sell the goods and bring the money into court to abide the event of the writ of error. Afterwards, when the writ of *supersedeas* was no longer used, and the writ of error itself was held to operate as a *supersedeas*, the same rule was observed. (i) And it has been since applied, under our acts of Assembly, to the time of giving bond to prosecute the writ of error with effect, which alone operates here as a *supersedeas*. Whence it would seem necessarily to follow, that although a plaintiff might be prevented by a *supersedeas* from having the product of an execution upon his judgment which had been actually levied, yet the sheriff might be allowed to sell, to bring the money into court, and to retain the poundage fees.

As a general rule an injunction commands nothing to be done, or to be undone; its intention and operation is to preserve all things in the condition it finds them until the equity can be heard and determined. (j) In these respects the analogous principles relative to a stay of further proceedings, produced by the *supersedeas* of a writ of error, appear to have been applied to an injunction to stay proceedings at law. If the defendant had been taken into custody under a *capias ad satisfaciendum* before the injunction was served upon the sheriff, the injunction would not, in itself, operate as a discharge; but the sheriff might still detain him. Yet, in such cases, the defendant, by the special interposition of

(i) *Meriton v. Stevens*, Willis, 250; *Ringgold's case*, 1 Bland, 8.

To the Right Honourable the Lord Proprietary of this Province; The Humble petition of Thomas Collins sheweth, That whereas your petitioner the last Provincial Court had a verdict given for him against John Watkinson in a plea of trespass and ejectment; which said verdict and the judgment thereupon is, this court arrested on a suggestion grounded only on the juror's own confession, that he, one of the jury, Evan Carew by name, was an alien; when, if that were true, yet ought the plaintiff Watkinson to have challenged him for that; for which reason your petitioner humbly prayeth your Lordship's writ of error, returnable the next Assembly, to correct the said judgment. And your petitioner shall as in duty bound ever pray, &c.

3d April, 1633 —C. BALTIMORE.—To the chief clerk or register of the Chancery Court of Records. Let a writ of error be granted as is prayed; the petitioner giving good and sufficient security according to the act of Assembly in that case provided.

Writ of error, *supersedeas*, and *scire facias* then issued, according to the foregoing petition and order, 3d April, 1633.—William Cocks, register.—*Chancery Proceedings*, lib. C. D. fol. 368.

(j) *Eden*. Inj. 233; *Murdock's case*, 2 Bland, 470.

the Court of Chancery, might be discharged. In doing which, however, great care would be taken to make him as liable as if he had been kept in execution for the debt; and particularly, that he should be responsible for the sheriff's poundage fees, and for all other incidental expenses. (*k*)

The act of Assembly has altered the law upon this subject so far as, that upon the service of the injunction the sheriff must discharge a defendant held in custody under a *capias ad satisfaciendum*. (*l*) But it is perfectly manifest from the language of this act, that it was not the intention of the Legislature thereby to impair the rights of the sheriff; or to lessen the liability of the defendant in any other respect whatever; and, consequently, as we have seen, although the defendant was discharged from custody, yet the sheriff might recover his poundage fees in like manner as any other fees. (*m*)

Upon the same principles it was the established law, that if a *fieri facias* had been levied upon the property of the defendant before the sheriff was notified of the injunction, he could not proceed to sell; but must return the fact of his having been so stayed, and hold the property taken until the injunction was dissolved, or otherwise disposed of. But after the dissolution of the injunction the sheriff might proceed to sell, or he might be commanded to do so by a *venditioni exponas*. (*n*)

A partial alteration of the law upon this subject has been made by an act of Assembly which declares, that, where personal property has been taken in execution, the sheriff, on being served with an injunction, shall deliver it back to the party from whom it

(*k*) *Franklyn v. Thomas*, 3 Meriv. 234.—(*l*) 1826, ch. 157.—(*m*) *Howard v. The Levy Court*, 1 H. & J. 566.—(*n*) *Blacklock v. Maddox*, 2 Harris' Entries, 694; *Cockey v. Chapman*, 2 Bland, 83, note; ———, 6 Peters, 658.

BOYCE v. BRADFORD.—*February*, 1720.—Mr. Daniel Dulany appears with liberty to move for a dissolution of the injunction next court. And forasmuch as the complainant has given good and sufficient security in forty-six thousand pounds of tobacco in the case here depending between the said complainant and defendant. Therefore *Ordered*, by the Chancellor, that Mr. Sabret Sollers, high sheriff of Calvert county, let the complainant have liberty to make use of the tobacco in the said sheriff's hands, as he the said Boyce shall see occasion.—*July*, 1821.—Answer with liberty to move for a dissolution of the injunction this court.—*July*, 1723.—Exceptions filed to the answer, to be argued last court. For answer this court—Argued and adjudged good.—*Ruled*, that the defendant make a better answer, and pay the complainant 800 pounds of tobacco, costs, as well on the overruling the exceptions aforesaid, as for scandal in the answer alleged. Further answer to be filed according to rule.—*Chancery Proceedings*, lib. P. L. fol. 568, 672, 887.

was taken. (o) This provision is expressly confined to personal property; the law remains unaltered as to any real estate which may be taken in execution; and, consequently, after the dissolution of an injunction, which had prevented a sale of lands, the proper mode is for the sheriff to proceed to sell under the original levy, which remains unbroken; or to have him commanded to make a sale of it by a *venditioni exponas*. (p) I cannot conceive, that this act of Assembly which directs the personal property to be re-delivered, will admit of being so construed as in any manner to impair the sheriff's right to his poundage fees. Its avowed object was to relieve him from his responsibility as the keeper of perishable property; and to benefit the defendant by delivering it back to him. In other respects the sheriff's right to his fees remains unaffected.

From these views of the subject I feel satisfied, that the sheriff's right to poundage fees has not been, in any manner, shaken by the mere interposition of the injunction. According to the ancient course the court would not have discharged either the person or the property of the defendant from the custody of the sheriff under the execution, but upon the express condition, that his poundage fees should be paid or secured; (q) and the alterations made by the acts of Assembly go no further than to prevent the sheriff from holding the person or selling the personalty taken in execution as a means of obtaining payment of his fees.

But this suit was instituted, and the injunction obtained by a corporator of *The Cape Sable Company*, as complainant against that body politic, and the plaintiffs in the executions as defendants; and they have, by a special agreement, consented to a decree directing the whole of the property of this corporation to be sold. It is therefore this decree which has thus left this sheriff in the possession of a complete legal right without any means whatever at law of having it satisfied. If the injunction had been dissolved the sheriff might, as we have seen, have proceeded, under the levy he had made upon the land of this company, to make sale of it to satisfy his poundage fees; but the decree has deprived him of the right to do so.

The plaintiffs in the executions cannot be permitted to consent to a decree, or in any manner to produce a sale of the defendant's

(o) 1799, ch. 79, s. 10.—(p) *Bond v. Cooper*, 6 November, 1826.—*Per* BLAND, Chancellor.—(q) *Franklyn v. Thomas*, 3 Meriv. 234.

property under an authority different from that of the executions they had caused to be issued, and levied by the sheriff, so as to deprive him of his poundage fees. Such a course of proceeding by those plaintiffs, to the prejudice of the sheriff, would be a fraud upon him, which I find no ground to impute to them from any of their manifested intentions. Their consent to the decree for a sale must, therefore, be considered as an implied admission, that the sheriff's right should not be affected by it; and that his fees should be first satisfied out of the proceeds of the sale made under the decree.

Then as to *The Cape Sable Company*, and its several corporators, who were clearly liable in their politic capacity, they could not surely be allowed in any way to cast off their liability and leave this sheriff's claim unsatisfied. To turn this sheriff over to his action at law against this company, grounded on their legal liability, would be to leave him without the least redress; since it is shewn, that he could not even compel them to answer his demand; as they have no property which could be taken under a *distringas* to enforce an answer. (r) For it would seem, a corporation divested of the means of answering the ends of its institution is thereby dissolved. (s)

I am therefore of opinion, that the claim of this petitioner is a just and legal one; and that upon the equity arising out of the peculiar circumstances of this case, it is indispensably necessary, that this court should take cognizance of it and grant to the petitioner the relief he asks; and that his claim should be paid in preference to the plaintiffs in the executions, and *The Cape Sable Company*, or any of its corporators.

According to the strict principles of the feudal system, the feudatory was not allowed to alien any land held by him of his superior; nor could land so held be sold under an execution for the payment of debts, lest such a sale might be resorted to as an indirect mode of alienation. But apart from those principles of feudal law; land, according to all law, at all times, and every where, appears to have been considered, in this respect, as a species of property deserving the most deliberate regard. Not being capable, like mere perishable moveables, of being safely, and with-

(r) Bac. Abr. tit. Corporation, E. 2; *Adley v. The Whitstable Company*, 17 Ves. 316; S. C., 1 Meriv. 107.—(s) *The King and Queen v. The Mayor of London*, 12 Mod. 17; S. Ca. 1 Show. 274; Com. Dig. tit. Franchises, (G. 5.)

out disadvantage, passed at every season, and immediately from hand to hand; the alienation and transfer of land from one to another has been every where required to be made and authenticated with a higher degree of solemnity than mere personal estate. And as agriculture has always been regarded as the first of pursuits, and of the highest importance to the commonwealth; (*t*) no compulsory alienation has been allowed to be made, in any case, to the prejudice of husbandry, or so as to endanger the loss of any then growing crop. (*u*) For these reasons it seems to have been every where regarded as a general rule, that land should not be liable to be taken in execution and sold, where there was a sufficiency of moveables to be found for the satisfaction of the debt. (*w*) And, following out the reason of this general rule, it has always

(*t*) Co. Litt. 85; Vattel, b. 1, c. 7.—(*u*) Co. Litt. 55; Land Ho. Assis. 121.—(*w*) 2 Inst. 18, 394; Gilb. Execution, 3; Gilb. Co. Exch. 123; 7 Petersdorffs, Abr. 527, note; Code Napoleon, by Barret, Introd. 328; 3 Southern Review, 30, 31; *Bowaman v. Reeve*, Prec. Chan. 577; Anonymous, 9 Mod. 66.

The English statute of 1285, (13 Ed. 1, c. 18,) which gave the *elegit*, by which all the debtor's personalty, or a moiety of his lands might be taken in execution, in favour of husbandry, excepts his oxen and beasts of the plough.

By an act of the Provincial government, it is set forth, that 'whereas many of the inhabitants of this province are and have been exceedingly grieved and burthened by executions laid upon them in the summer time, when it is not possible for them to procure effects for the payment and satisfaction of their creditors, by means whereof they are often times kept in prison a long time, and thereby disabled from making and tending their crops, to the great prejudice, if not ruin, of many of the inhabitants of this province, being thereby left destitute of any means to satisfy their creditors.'—1715, *ch.* 33.—And by another act it is declared, that no slave shall be sold by any administrator for the payment of debts; nor any execution served upon any slave so long as there shall be other goods of the deceased sufficient to satisfy the debt, but shall be kept and employed for the benefit of the creditors and orphans, until the crop begun in the life-time of the deceased, shall be finished.—1715, *ch.* 39, s. 8.

By a British statute passed about the year 1816, for the purpose of regulating the execution of legal process, so as to be consistent with good husbandry, it is enacted, that the sheriff shall not carry off, or sell for the purpose of being carried off from any lands, let to farm, any straw, threshed or unthreshed, or any straw of crops growing, or any chaff, colder, or any turnips, or any manure, compost, ashes, or sea-weed, in any case whatever; nor after notice, any hay or vetches, nor any roots or vegetables being the produce of such lands, where, according to any written agreement with the landlord, the same is to be expended thereon; but shall sell the same under certain regulations, to be there used and expended, according to the custom of the country; or according to the written agreement, as the case may be. And by the sixth section of this statute, all crops and produce so sold, and all cattle and implements of husbandry employed and used in and about the same, are protected from distress.—56 *Geo.* 3, c. 50; *Bradby on Distress*, 84; *Watson on the Office of Sheriff*, 180.

been the course of this court, in all cases, where a sale of real estate has been made under its order or decree, to have a delivery of the possession so made as to insure the safety of the then growing crops. (x)

The statute of 1732, which subjects land to be taken in execution and sold for the payment of debts, makes no distinction between real and personal estate. (y) And I know of no case, in this state, in which it has been held or even intimated, that in executing a writ of *fiery facias*, the plaintiff or the sheriff was under any, the least obligation to endeavour to obtain satisfaction first out of the personal estate of the defendant. (z) Yet as the ancient common law did make such a distinction; and as the personal estate is, in many respects, considered by our law as the primary and natural fund for the payment of debts; (a) the personal estate should, in this instance, have been first applied. And, therefore, the sheriff here must be held to be entitled to poundage fees on the personalty, so far as it would have gone, according to its appraised value, towards the satisfaction of the sums really due; and for the residue to poundage fees upon the realty. (b)

Whereupon it is *Ordered*, that the petitioner *William O'Hara* be and he is hereby allowed poundage fees as prayed; that is to say, the amount of such fees to be estimated according to law, on the personal property taken in execution by him as aforesaid, so far as the same was adequate, according to its appraised value, to have satisfied the amount really due upon the said executions, and required to be made by them; and upon the residue thereof, which must have been satisfied out of the real estate so taken in execution, according to law as where lands are taken in execution and sold. (c) And it is further *Ordered*, that the said poundage fees are hereby allowed out of the proceeds of the sales of the property of *The Cape Sable Company* in preference to the claims of the plaintiffs in the said executions, and of *The Cape Sable Company* and its corporators. And the auditor is hereby directed to state the claim accordingly.

(x) *Doe v. Witherwick*, 11 Com. Law Rep. 8; *Rawlings v. Carroll*, 1 Bland, 75, note; *Dorsey v. Campbell*, 1 Bland, 364; *Tyson v. Hollingsworth*, 2 Bland, 334, note.—(y) 5 Geo. 2, c. 7; *Coombs v. Jordan*, ante 284.—(z) *Hanson v. Barnes*, 3 G. & J. 367; *Osborne v. Woodson*, 1 Haywood, 24.—(a) *Hammond v. Hammond*, 2 Bland, 317; *Clanmorris v. Bingham*, 12 Cond. Chan. Rep. 253.—(b) *Clerk v. Withers*, 6 Mod. 299.—(c) November, 1779, ch. 25, s. 4 and 5; 1790, ch. 59; 1813, ch. 102, s. 5 and 6.

On the 20th of April, 1829, *Philip G. Lechleitner*, as a claimant against the proceeds of sale in this case, by his petition, not on oath, stated, that the sheriff *O'Hara* had, by a special contract, agreed to accept as a compensation for his services a sum about two-thirds less than his legal poundage fees. Whereupon he prayed, that *O'Hara* might be ordered to answer, and that the matter might be reheard. On the 21st of the same month this application was dismissed with costs.

On the 25th of April, 1829, *George Neilson*, administrator of *James Neilson*, deceased, *Eli Balderson*, *Benjamin Welch* and *Hugh Mullen*, creditors, who had filed their claims against *The Cape Sable Company*, under the decree, by their petition, not on oath, stated, that no payment had then been made to *O'Hara* under the order of the 15th December; that the time allowed by the notice given, as directed by the decree, for creditors to bring in their claims, expired on the 30th of December last; after which day, and before the passing of the order of the 15th of December, they had filed their claims; and, therefore, they had neither in point of law or of fact, any notice of *O'Hara's* petition, or any opportunity of controverting his claim; that *O'Hara* had entered into a special contract to accept as a compensation for his services, much less than his legal fees; and yet had, in his petition, suppressed all mention thereof; thereby leaving the court to presume, that he was entitled to the full amount of his poundage fees. Whereupon they prayed, that *O'Hara* might answer; and that they might have such relief as seemed right, &c.

27th April, 1829.—BLAND, Chancellor.—Upon this petition I must repeat what I have said on the petition of *Philip G. Lechleitner*, that the order of the 5th of November last, placed it in the power of all who had a right to oppose the claim of *William O'Hara* to do so on the day appointed. The matter of the foregoing petition, it is clear, might, then as now, have been offered as a cause why *O'Hara's* claim should not be allowed; but it was not then presented. This petition assigns no reason why this matter was not then introduced by the parties who might then have done so. Whether this suit was then to be contemplated as a creditor's bill or not; or, in whatever light *O'Hara's* claim may be considered, it is very clear, that it has been regularly put in issue, tried and adjudicated upon between him and those with whom, if at all, he contracted as is alleged, and of whom he had a right to make the demand. On a creditor's bill the originally suing credi-

tor's claim having been determined to be valid, as between the then parties, can never be again questioned by any creditor who may thereafter come in; nor is there any instance in which a claim once established as between proper parties, can be again questioned by any one who may be thereafter allowed to come in and participate with either of the original litigants; unless upon some ground of alleged fraud and collusion. (d)

Whereupon it is *Ordered*, that the foregoing petition of *George Neilson* and others, be and the same is hereby dismissed with costs.

After which the auditor made and filed a report, dated on the 18th of February, 1830, in which he says, that he had examined the proceedings of these cases, and stated all the claims exhibited against the estate of *The Cape Sable Company*. Claim No. 1, is for a judgment recovered by *Robert Oliver* against the said company, on which a *fieri facias* was issued and laid on all the real and personal estate of the company. The complainants by their bill of complaint impeached said judgment for fraud and irregularity. And by their exceptions, filed on the 20th of April, 1829, they object to the auditor's report of the 29th of February, 1828, so far as relates to the said claim, because there is no sufficient evidence to sustain the said claim, and because said *Robert Oliver* has no legal or equitable claim against the said company, or its funds or property; and because said *Robert Oliver*, if a creditor at all, is to be deemed a general creditor, and not a judgment creditor, nor entitled to any preference, as a creditor, whatsoever. And by other exceptions, filed on the same day, they deny, that said claim has any foundation in law or equity; and also deny, that, if deemed a creditor at all, the said *Robert Oliver* is to be considered a judgment creditor, or entitled to any preference whatsoever as a creditor; and also object, and plead the act of limitations against said claim. Similar exceptions have been filed by *P. G. Lechleitner*, who has exhibited a claim against the said estate. The auditor thinks he is bound to consider *Robert Oliver* as a *bona fide* judgment creditor, and allows the claim accordingly.

Claims No. 2, 3, 4 and 5, are on judgments rendered against the company, and now entered for the use of *Charles Carroll of Carrollton*. The complainants and *P. G. Lechleitner* have filed objections to the said claims, similar to those before stated against

claim No. 1. The auditor reports, that those claims are also allowed as *bona fide* judgments.

The solicitor for *Robert Oliver* has instructed the auditor to allow claim No. 1, a preference over all other claims against said estate. And the solicitor for *Charles Carroll* insists, that No. 2, 3, 4 and 5, are to have preference over claim No. 1, and all other claims. The auditor is unable from the evidence now before him to determine this question of priority.

The said *Philip G. Lechleitner* has also relied on similar exceptions to claim No. 6; the claim of *James Neilson*, deceased. And the defendant *Robert Oliver* has, by endorsement on the said claim, objected, that the same is not due, and also, that it was barred by the act of limitations. As to the sum of \$393 66, the principal and interest of *Philip G. Lechleitner's* note to and endorsed by *Richard Caton*, the said claim is destitute of proof; as there is no evidence to connect the said note with the transactions of the company. The residue of the claim is for the amount of two bills of said *Lechleitner's*, and one *Gerard Troost* on *Alexander Mitchell*, in favour of *Richard Caton*, and by the latter endorsed; which bills profess to be on account of The Alum and Copperas Company; or, as it is supposed, of *The Cape Sable Company*. To those bills is annexed a copy of a bill of sale, by said *Lechleitner* and *Troost*, to *James Neilson* and *Rosewell L. Colt*, of all the grantor's interest in The Alum and Copperas Works at Cape Sable under their contract with *The Cape Sable Company*, in trust, amongst other things, to secure the payment of the sum of five thousand dollars due to said *James Neilson*, on certain promissory notes of said *Lechleitner* and *Troost*, endorsed by said *Richard Caton*, and *Alexander Mitchell* as agent of the said company, and discounted for said *Lechleitner* and *Troost*, to enable them to carry on The Alum and Copperas Works at Cape Sable; and also all other debts which are or may be contracted by said *Caton* or *Mitchell*, or to which they or either of them may be a party bound by accepting, or endorsing, or otherwise for the use of said *Lechleitner* and *Troost*.

The auditor finds, that said *Mitchell*, *Lechleitner* and *Troost*, as agents, were in the habit of drawing, endorsing and accepting bills and notes on account of *The Cape Sable Company*, and that in the ledger book of the company, folio 8, the said *James Neilson* is made a creditor for amount of the said two bills. The last entry, in relation to these bills, is of the 31st of December, 1823. But the

defendants, including *The Cape Sable Company*, and *Robert Oliver*, on the 19th of March, 1827, under a commission issued in the causes, filed an account, W. 1; which professes to be an account of the debts due by the company, and states this claim to be a claim against the company. Under these circumstances the auditor submits, that the said claim is not barred by limitations. But the auditor further suggests, that if those bills were intended to be secured by the mortgage, before referred to, they are to be considered as given, in fact, for the proper debt of the drawer's; and *The Cape Sable Company* would be in the nature of a surety. The general usage, in the case of a claim filed against the estate of a surety, is to require proof of the insolvency of the principal debtor. He submits, whether the peculiar form of the contracts which renders the company primarily liable at law, should exempt this claim from the operation of the general rule.

Claims No. 7 and 8, are not proved in the usual manner. They are on notes of more than three years standing; and appear to be barred by limitations; which is pleaded by *Robert Oliver*.

The said *Robert Oliver* has also pleaded limitations against claims No. 9 and 12. But the auditor thinks they are not barred; as payments are proved to be made on account within three years. Claim No. 10 is not proved in the usual manner. The said *Robert Oliver* has also pleaded the act of limitations against claim No. 11. But by the auditor's report, filed 8th of March, 1828, the said *Eli Balderson*, the claimant, is made a creditor to the amount of \$2,285 25, exclusive of interest. If, as the auditor is inclined to think, the said report, prepared from materials furnished by the company, is evidence against the defendants to rebut the plea of limitations, there will be sufficient evidence to sustain the whole claim as stated. The auditor's report, so far as respected this claimant, was *ex parte*; whereas, for the amount of his claim, he relies on an account stated between himself and *A. Mitchell*, the agent of the company.

Claim No. 14 is the claim of *Gerard Troost*; who was, for several years, the manager or superintendant of *The Cape Sable Company's Works*. It commences in September, 1813, and continues to the year 1822. A number of vouchers have been filed to sustain the account; but so many are defective in form, that the auditor is unable to state any satisfactory account from them. He has found, amongst the papers filed by the company, an account which agrees substantially with the account now exhibited. It does not appear,

that the company ever accepted the said account ; neither does it appear to have been rejected. But, considering the nature of the relation which existed between the parties, and the character of the expenditures made by the claimant ; and that no further account was called for by the company, the auditor thinks, that the claim may be allowed without further proof ; at least, to the extent of the payments proved to have been made by any of the vouchers exhibited, whether those vouchers be in form or defective. The claimant has also filed two little books, A. and B., which are proved to have been kept by one *A. Hilgar*, who was a clerk in the employ of the company, and is since dead. The books prove expenditures to the amount of \$5,742 83 ; but as credits are admitted on general account to the amount of \$7,264 19, it is supposed, that the claimant can derive no benefit from those books.

No. 15 is the claim of *Philip G. Lechleitner*, who was also an agent of the company ; and is of many years continuance. The claimant, from time to time exhibited accounts current, which seem to have been accepted by the company, and entered upon the company's books. But those books being kept upon mercantile principles ; and exhibiting only general results in complex forms, between which and simple details, it is extremely difficult to institute a comparison, the auditor has endeavoured to test the accuracy of the accounts now filed with the aforesaid accounts current. He finds they correspond substantially from the commencement to the entry of the 21st of August, 1819, inclusive, except in the particulars stated in the schedule herewith returned. The charge of \$394 70½, as of the first of July, 1821, is sustained by an entry in the day-book, folio 99 ; and the charge of \$1,381 02¼, as of the first of May, 1823, is sustained by an account formerly exhibited, and an entry on the day-book, folio 124, for \$1,381 85. The remaining charges from the 21st of August, 1819, are not sustained by vouchers. The auditor has, nevertheless, for the present, adopted the claimant's statement and allowed interest from the 10th of August, 1824.

The claimant has also exhibited another statement ; in which he adopts the balance stated to be due by the company's ledger, folio 55 ; reserving to himself the liberty of shewing errors, which, he alleges, exist to a considerable amount. The auditor has restated the claim upon those principles as claim No. 16. In the first place the claimant adds to the balance, appearing due on the books, the amount of additional expenditures since the last entry therein ; say

the 31st of December, 1823. The only objection to this part of the claim is, that no vouchers are exhibited to sustain it.

He next claims for amount of a draft supposed to have been drawn by the claimant on *Alexander Mitchell*, in favour of *Richard Caton*, at six months, for \$2,500; which is charged to him in day-book, folio 93. The books appear to have been made up some time after the transactions recorded had taken place; and by an accountant who does not seem to have had any personal knowledge of the affairs of the company. And immediately after the entry, the accountant adds this memorandum. 'There is some doubt as to the correctness of the dft. of \$2,500 being ch'd as above; but neither *Mr. C.* nor *Mr. M.* seem to be prepared to explain the transaction; therefore, it is deemed advisable to make this entry for the present, with the advice of *Mr. C.*, to be investigated in future.' As the proposed investigation has never taken place, and as no explanation has been made to the auditor, it is submitted, that the claimant is entitled to be relieved from this charge.

The third error charged is for the amount of *Snelling* and *Mason's* acceptances of the claimant's drafts for \$940 and \$650, entered in day-book, folio 69; which is supposed to be a double entry for the proceeds of the first acceptance, entered in folio 23, for \$931; and of the second entered in folio 25, \$518 10. The auditor thinks those entries relate to the same transactions. But in folio 22, there is a cross entry for the proceeds of the first acceptance; and in folio 25, there is a cross entry for the proceeds of the second acceptance; which neutralize the former entries in folios 23 and 25, and leave the claimant chargeable only with the nominal amount of the acceptances as charged in folio 69. The transaction appears to be as follows. The company had consigned a parcel of alum to *Snelling* and *Mason* of New York; and, in anticipation of sales, the claimant drew the bills in question on *Snelling* and *Mason* in favour of *Alexander Mitchell*; who discounted the same, and remitted certain sums, as the proceeds thereof, to the claimant at Philadelphia, with the sum so remitted he is chargeable, but with nothing more. The auditor, therefore, thinks the error consists in charging the claimant with the nominal amount of his drafts, \$1,590, instead of the sums remitted to him as the proceeds thereof, \$1,449 10.

The fourth error is for amount of account of *I. and A. and W. B. Post*, \$195 51; as of the 9th of December, 1820, charged in

day-book, folio 99. As the articles included in this account, from their nature, and from the entries on the books, appear to have come to the use of the company, the claimant seems to have been improperly charged as between *Messrs. Post* and himself, unless a cross entry is made, allowing him the amount as against the company.

The fifth error alleged is for amount of two drafts on and accepted by *A. Mitchell* in favour of *R. Caton*, at four months; the one dated the 19th of February, 1822, for \$649; and the other dated on the 10th of February, 1822, for \$623 43. In day-book, folio 65, the claimant is made debtor to drafts accepted for amount of those drafts, and in folio 93, is made debtor to the company for payment of the same drafts by *A. Mitchell*, agent. The auditor thinks that this error is proved.

But in the sixth place, the claimant denies his liability for the amount of the draft for \$623 43; insisting that it should be charged in account to *Dr. Troost*. But no evidence of *Troost's* liability has been furnished; and in the absence of such evidence, the claimant should not be relieved from the charge.

The seventh error complained of, is for the claimant's draft in favour of *Charles F. Mayer* for \$50. It is alleged, that this draft has not been paid by the company. But no proof has been furnished, by which the auditor could try the correctness of this allegation. The auditor, therefore, thinks, that the error is not proved.

The last error is for amount of the capital furnished, or supposed to have been furnished by the claimant. He claims for capital, and additional capital, the sum of \$9,166 66; and for negro capital the sum of \$1,197 70. The former sum is entered in ledger, folio 9; but he is clearly mistaken in supposing, that he has been charged with the amount of his negro capital. The auditor has, therefore, made a deduction only of the amount of capital and additional capital. But to this reduced allowance the auditor objects; because, as capital, it cannot be considered a claim on an equality with the claims of creditors of the company, but should be introduced in an account of distribution of surplus estate, if there be any surplus, among all the capitalists. And if the auditor be correct in this opinion, the claim should be further reduced by the amount of negro capital, to the amount of which the claimant's advances are applicable. For the same reasons, the amount of capital to be contributed by the claimant, *viz.* \$10,364 36, should

be reduced from the amount of claim No. 14; no credit having been allowed therefor in said claims.

But the auditor further reports, that by an agreement made and entered into between *Richard Caton* and others, who were afterwards incorporated by the name of *The Cape Sable Company*, of the first part, and said *Philip G. Lechleitner* and *Gerard Troost* of the second part; and dated on the 25th of September, 1813, the said *Lechleitner* and *Troost* engaged to erect and establish, on the lands at Cape Sable, belonging to said *Richard Caton* and others, works for making copperas and alum; and to carry on and superintend the same; and to supply and furnish one-half part of the whole capital that might be found necessary for so establishing and carrying on said works. By a subsequent article of the same agreement, the said *Lechleitner* and *Troost* undertook to furnish all the capital, above five thousand dollars, which should be necessary for the purposes aforesaid; and provision was then made for distribution of the profits of the works between the parties to the agreement. The auditor thinks, that this agreement made said *Lechleitner* and *Troost* co-partners with the said *Caton* and others; and with *The Cape Sable Company*, since its incorporation; and as such their claims, for capital, or for additional advances, should be postponed to the claims of the mere creditors of the company. This objection applies to claims No. 14, 15 and 16. It may be proper to remark, that *P. G. Lechleitner* is charged on the books of the company with the whole amount of capital, stipulated to be furnished by said *G. Troost* and himself.

The auditor further reports, that said *P. C. Lechleitner* by a writing, dated on the 26th of September, 1816, in consideration of some money lent, assigned to *Paul Busti*, since deceased, all his right and interest in the copperas and alum manufactory at Cape Sable, and the whole amount of his advances made for the same, as security for moneys lent, or to be lent; and also for notes discounted by said *Busti* for said *Lechleitner*; that by a deed, bearing date on the 31st of August, 1820, the said *Lechleitner* and *Troost* assigned unto *Rosewell L. Colt* and *James Neilson*, all their right, title, interest and estate in and to the aforesaid works, as used and enjoyed by them under their contract with the company, in trust, to secure the payment of certain moneys due from said *Lechleitner* and *Troost* to said *Rosewell L. Colt* and *James Neilson*; a copy of which is filed with claim No. 6. And by another deed, executed on the 10th of August, 1822, the said *Lechleitner* assigned unto said *Paul*

Busti all his share, right, interest, claim and demand in and to the aforesaid works, and also all claim and demand, that he might have against the said works, for advances of money made for the said establishment. This last deed notices the assignment of the 26th of September, 1816; and professes to be made to secure the payment of the sum of \$10,296 48, as of the first of January, 1822. The auditor thinks the claims of said *Lechleitner* and *Troost*, if established, will be liable for payment of said claim No. 6, in the first instance; and that the residue of the said claim of said *Lechleitner*, to the extent of the sum of \$10,296 48, with interest from the first of January, 1822, will be payable to the said *Paul Busti's* representatives.

The auditor further reports, that the trustees have not yet obtained an allowance for their expenses; and that the claim of said *P. G. Lechleitner* which was, by an order of the 24th of September, 1829, referred to *Samuel Moale*, *William Gwynn*, and *Charles F. Mayer*, has not yet been adjusted. He is therefore unable to state an account with the trustees.

After this report of the auditor was filed the plaintiffs excepted to it; because it allowed the claims of *Robert Oliver*, *Charles Carroll*, *Eli Balderson*, and *James Neilson*, who have in truth no claim whatever, legal or equitable, against the estate of *The Cape Sable Company*; because their claims, if any they have, are not sustained by any proof; and because each and all of them is and are barred by the statute of limitations. And the defendants excepted to it, because it did not charge to *P. G. Lechleitner* the sum of \$17,000, borrowed by the *Cape Sable Company* for him by the resolve of the 4th of February, 1822, and to him advanced.

The defendant *Robert Oliver* excepted to this report. *First*. Because it did not award to him, as a judgment creditor, a satisfaction in preference to all others. *Second*. Because the claims of *James Neilson*, No. 6; of *Leonard Foreman*, No. 7; of *Benjamin Welsh*, No. 8; of *Hugh Miller*, No. 9; of *James A. Sangston*, No. 10; of *Eli Balderson*, No. 11; of *Mary Mullen*, No. 12; of *Edme Ducatel & Sons*, No. 13; of *Gerard Troost*, No. 14; and of *Philip G. Lechleitner*, No. 15 and 16, are not sufficiently proved; and are barred by the act of limitations. *Thirdly*. Because the claims of *Troost* and *Lechleitner* are without any foundation in law or equity. *Fourthly*. Because the claimants of *Troost* and *Lechleitner* were partners with *The Cape Sable Company*; and, as such, not only not entitled to be allowed any thing, but are personally

responsible to this exceptant *Robert Oliver*. And, *lastly*, Because *The Cape Sable Company* cannot be held liable for the claim of *James Neilson*, No. 6, until it shall have been proved that *P. G. Lechleitner* and *G. Troost* are insolvent, which has not been shewn and is not the fact.

The defendant *Charles Carroll* excepted to this report. *First*. Because it does not award to him, as a judgment creditor, whose claims are No. 2, 3, 4 and 5, a preference to all other claims. *Secondly*. Because it should have allowed no other claims than that of *Robert Oliver*, No. 1, and that of this exceptant. *Thirdly*. Because it allows the claim of *P. G. Lechleitner*, No. 15 and 16, when, in fact, he is largely indebted to *The Cape Sable Company*. *Fourthly*. Because *P. G. Lechleitner* is not charged with many, and large sums of money, that appear from the proceedings to be due from him to *The Cape Sable Company*. *Fifthly*. Because it does not allow the judgments marked as claims No. 1, 2, 3, 4 and 5.

Philip G. Lechleitner for himself, and on behalf of *J. J. Vanderkemp*, executor of *Paul Busti*, excepts to this report. *First*. Because it is wrong in admitting the claim of *Robert Oliver* as a *bona fide* and regular judgment. *Secondly*. Because *Oliver's* claim is altogether inadmissible, as an equitable claim, or as that of a general creditor; is unsustained by any evidence; and is barred by the statute of limitations. *Thirdly*. Because *Carroll's* claim is not sustained by any evidence; is not admissible as a *bona fide* and regular judgment claim; or as that of an equitable or of a general creditor; and is barred by the statute of limitations. *Fourthly*. Because the claims of *Eli Balderson* and *James Neilson* are unsupported by any evidence; and are barred by the statute of limitations. *Fifthly*. Because it has rejected from his claim, No. 16, the items designated as expenditures since the last entry in *The Cape Sable Company's* books of December 31st, 1828; and also those designated as the third, sixth, seventh, and eighth, or last errors claimed by him to be corrected; and insists, that the amount of capital, additional capital, and negro capital, ought to be deducted from the amount of his claim. *Sixthly*. Because it insists, that the assignment to *James Neilson* and *Rosewell L. Colt* by this exceptant, entitles *Neilson's* claim to be paid out of this exceptant's claim, No. 16, in preference to *Paul Busti*. *Seventhly*. Because it ought to have allowed his claim absolutely and fully as he has stated it, and without any reservation or deduction. And

eightly, Because it declares, that *Lechleitner* and *Troost* are not respectively, or in any way to be considered as partners of *The Cape Sable Company*, or of the persons composing the association incorporated as *The Cape Sable Company*; or that any agreement of them, or either of them exists as stated.

Leonard Foreman, *Benjamin Welsh*, and *James A. Sangston*, rely on the first, second, third, and fourth exceptions of *Lechleitner*; and aver, that their respective claims are fully proved, and are not barred by the statute of limitations.

Gerard Troost relies on the first, second, third, fourth, and eighth exceptions of *P. G. Lechleitner*; and also excepts to it, because it insists, that his claim ought to be lessened by any deduction for capital, additional capital, or negro capital; and because of its denying the sufficiency of his vouchers fully to sustain his claim.

And *William O'Hara* also excepted to this report, other than so much of it as relates to the judgment claims. *First*. Because they are not proved according to law. *Secondly*. Because they never had any legal existence. *Thirdly*. Because they are barred by limitations. And he also relies on all the objections made by the auditor against the claims therein mentioned.

The claim of *Philip G. Lechleitner* for an allowance out of the proceeds of sale for certain fixtures to which he asserted a right, and which were included with the property sold, having been referred to arbitration, the arbitrators returned an award; which, by an order passed on the 27th of April, 1831, was finally ratified and confirmed.

After which the auditor made another report, bearing date on the 19th of May, 1831, in which he says, that he had, at the instance of *William O'Hara*, stated an account between the trustees and the estate of *The Cape Sable Company*, whereby the proceeds of sale are applied to the payment of the trustees' allowance for commissions, the costs of this suit, the claim of *William O'Hara* for poundage fees, as directed by the order of the 15th of December, 1828, on \$26,410, the appraised value of the personal estate taken in execution at seven and a half *per cent.* on \$26 67, and three *per cent.* on the residue. And on \$432 87, the balance, as real estate, at three-fourths *per cent.*; amounting to \$796 75; with \$7 26 costs of his petition; and the sums awarded to *Philip G. Lechleitner*, leaving an unappropriated balance of \$20,164 98. But although the whole of *P. G. Lechleitner's* claim, as adjusted

by the award is allowed in said account; yet the auditor begs leave to suggest a doubt whether the claimant is entitled to any preference over other claimants as to the sum of seven hundred and fifty dollars, agreed and awarded to be paid to him for submitting to an arbitration of his claim.

This report of the auditor, as regards the claim of *O'Hara*, by an order of the 24th of June, 1831; and as regards the arbitrated claim of *Lechleitner*, by an order of the 22d of July, 1831, no cause having been shewn, although notice given, was finally ratified and confirmed; and the trustees directed to apply the proceeds accordingly.

The auditor, in a report bearing date on the 30th of January, 1832, says, that in obedience to the instructions of the solicitor of *The Cape Sable Company*, of *Caton*, and of *Carroll*, he had restated the claim of *Philip G. Lechleitner*. Adopting his former statement of said claim No. 16; he has credited the same by the amount of *R. L. Colt's* account for *P. G. Lechleitner's* notes mentioned in the resolve of the company of the 4th of February, 1822, and interest thereon from the 31st of December, 1821. And by the balance of the sum of \$17,000, borrowed under said resolve for said *Lechleitner*, to be used under his contract of the 25th of September, 1813. And by interest on said sum of \$17,000, from the 20th of February, 1822, to the day of sale.

The auditor has adopted the statement of said claim No. 16, because it was the more favourable statement for the parties who required his further account. And he has confined himself to the allowance of the credits before mentioned, because they were specifically required by his instructions; and because the exceptions filed by the defendants on the 14th of November, 1831, seem to admit, that in all other particulars, the auditor's statement of said claim is correct. The auditor retains the opinions which he expressed in his report of the 18th of February, 1830. And he does not clearly perceive, that the said claim can be credited with the aforesaid sum of \$17,000, upon any principle which will not render the said *Lechleitner* equally liable for all other debts of the company.

And as it may be inferred from the instructions in obedience to which the present account is stated, that the auditor's opinions, expressed in his former report, are misunderstood, he begs leave to submit the following remarks in explanation.

The opinion is still entertained, that the agreement of the 25th of September, 1813, made the said *Philip G. Lechleitner* and

Gerard Troost, co-partners with the said *Richard Caton* and others ; and with *The Cape Sable Company* since its incorporation ; and as such their claims for capital on additional advances, should be postponed to the claims of the mere creditors of the company. And, as a consequence, the said *Lechleitner* and *Troost* are personally liable for all contracts and engagements entered into by the company in furtherance of the objects of the association.

The auditor distinguished the claims of the said *Lechleitner* and *Troost* for capital from their claims for additional advances ; because the distinction was made by the said *Lechleitner* in his own statements ; and was recognized by the books of the company. But the agreement of the 25th of September, 1813, to which the auditor referred, converts all advances of the said *Lechleitner* and *Troost*, until profits were made sufficient to meet disbursements, into capital, and provides for their reimbursements as capital. The aforesaid claims are therefore to be treated as the claims of co-partners for capital advanced to the common stock.

The aforesaid agreement provides for a distribution of partnership property in the event of a dissolution ; which was operated by a decree in this case. But as, in the auditor's opinion, the concern is insolvent and inadequate to the payment of debts, the auditor supposed it was unnecessary to attempt an adjustment of the claims of the partners. The claim of *P. G. Lechleitner* was stated, because it was filed and insisted on as a claim of a creditor. The auditor's report was intended to exhibit the facts on which the claim was founded, and the equities which might be supposed to arise thereout, considered as the claim of a creditor. But the auditor submits, that his said report does not admit the said *Lechleitner* as a creditor to any amount whatever.

After which, on the application of the defendant *Oliver*, it was, on the 9th of May, 1832, *Ordered*, that the auditor's reports and the exceptions thereto stand for hearing on the 8th of June following ; provided a copy of the order be served on the exceptants, or their solicitors, on or before the 20th instant. And copies having been served accordingly, the matter was afterwards brought before the court.

18th August, 1832.—BLAND, *Chancellor*.—This case standing ready for hearing on the auditor's reports, and the exceptions thereto ; and the solicitors of some of the parties having been heard, and the notes of the solicitors of some others of them having been read, the proceedings were read and considered.

It is a general rule, that all liens and incumbrances which are not in themselves vicious or defective must be satisfied according to their respective priorities. (e) Two of these parties, *Oliver* and *Carroll*, rely on their judgments as giving them liens which entitle them to be satisfied in preference to all other creditors of *The Cape Sable Company*. These plaintiffs and some of the other creditors, however, not only deny the legality of their liens, but the very existence of their claims; and as between *Oliver* and *Carroll* themselves, each claims a priority over the other. It will, therefore be necessary to enquire whether they are in truth to be considered as judgment creditors and from what date.

Upon the principles of equity by which this court has been so long governed in relation to the distribution of the estate of an insolvent living person among his creditors; and in regard to the application of the estates of deceased persons to the payment of their debts; upon the ground that creditors have by the misfortunes or death of such debtors been confined to a single fund from which alone they can obtain satisfaction; I can see no reason why this court may not, upon the same principles, where a corporation is admitted or shewn by proof to be in a condition of absolute insolvency, and especially if such insolvency must inevitably eventuate in its total dissolution, take cognizance of the matter, call in its creditors, and apply its effects in satisfaction of their claims, according to the course of proceeding in a creditor's suit. (f) And this case having heretofore, by the admissions of the parties, been submitted as a creditor's suit, I shall therefore continue so to consider and treat it.

The decree of the 5th of April, 1828, is founded not only on the admitted fact, that these debts were then due from the company to *Oliver* and *Carroll*; but also upon the concession, that *The Cape Sable Company* was then in a condition of absolute insolvency. That decree, and the agreement upon which it was passed, there being then no other creditors but *Oliver* and *Carroll* before the court, necessarily involved these facts and admissions; because the court could not, otherwise, have treated the case as a creditor's suit, and have ordered a sale to pay debts, none of which were then admitted or established; nor could the court have ordered notice to be given to the other creditors to bring in their claims upon any other

(e) *Rankin v. Scott*, 12 Wheat. 177.—(f) *Hammond v. Hammond*, 2 Bland, 316; *Shepherd v. Towgood*, 11 Cond. Chan. Rep. 206.

ground, than that the debtor then before court had been admitted or shewn to be in such a condition of insolvency as rendered an equal and equitable distribution of its estate among its creditors proper and necessary. Hence it is clear, in this as in every other similar case of a creditor's suit, that neither the plaintiff, nor those who come in under the decree, can now be allowed to draw in question and again put in issue any claim of any creditor whose claim has been thus established; except upon the ground of fraud and collusion of the then parties.

Here, however, these plaintiffs now again, and *Lechleitner* and others, who have come in under this decree, as creditors of *The Cape Sable Company*, have, by their exceptions to the auditor's report, not only denied the validity of these claims of *Oliver* and *Carroll* as judgment creditors, but have also denied that they can be considered as creditors of that company at all, or to any amount. But these matters have been heretofore put in issue; and, after a full investigation have been finally and by consent adjudicated upon; and therefore, must now be considered as entirely at rest; since, if it were otherwise, there would be no end to litigation.

But although it has been finally established, that *Oliver* and *Carroll* are to be considered as judgment creditors; yet as it has not been distinctly declared on which of their judgments they shall be compelled to rest their claim, it will be necessary now to ascertain that, in order to determine how they are to take rank in relation to each other.

It appears, that *Oliver's* first judgment was obtained on the 9th of December, 1822, in Anne Arundel County Court; and that its execution was stayed by an injunction from this court; for causes explained in the orders of the 21st of April, 1823, and the 7th of May, 1824; and because of its having been obtained in the court of a county not the proper residence of *The Cape Sable Company*.

As to what may be deemed the residence of a corporation, it may be well to recollect, that, as no government can give to its laws any extra-territorial operation, all bodies politic must necessarily be considered as artificial beings of that country by whose government they were incorporated; and alien entities in all other countries; that a corporation may, in the country of its origin, have a fixed locality and residence, from its nature and the terms of its creation; as a city, town, &c. And that all corporations; such as banks, &c. which are transitory in their nature; and which

are not limited to any place by the terms, and nature of their creation and objects, may be considered as domiciled, for some purposes, in that county of the state, by the government of which they have been created, where they transact their business; and for other purposes in that county in which their property is held. (g) It is said, that the name of a body politic is sometimes taken from the place of its residence; because a corporation has a fixed place where it is settled, and whence it cannot be removed, like a natural person; and therefore, that a *distringas* against it to compel an appearance, or obedience to an order or decree, must be directed to the sheriff of the county wherein it is resident. (h) In some cases the Legislature has anticipated and removed all ambiguity and difficulty in relation to this matter by expressly declaring, that suits against it shall be prosecuted in the county court of the county in which the president of the body politic shall reside. (i)

Admitting it, however, to be true, as a general rule, that all process against a corporation should be directed to the sheriff of that county of which it is resident; that there may be corporations liable to be sued any where, because of their having no distinctly fixed place of residence; and that this judgment, confessed in the court of Anne Arundel county, cannot be deemed illegal, because of that county not having been the residence of *The Cape Sable Company*; yet, as its act of incorporation has declared, that a meeting of its stockholders shall be held on the first Monday of April of every year, in the city of Baltimore, (j) the law has, so far as a special domicile can be given to such an institution, fixed its local habitation in the city of Baltimore. It is therefore clear, that this case comes within the spirit, if not within the letter of the provisions of those acts of Assembly which declare it to be unlawful to sue or arrest any inhabitant out of his proper county, or where he may happen to be found about his necessary affairs out of the county where he resides. (k) And, as it is obvious, that a fraud may be more easily practised by suing and obtaining a

(g) 2 Inst. 703; *Rex v. Gardner*, Cowp. 83; *Society, &c. v. Wheeler*, 2 Gall. 131.—
 (h) Gilb. Com. Pleas, 228; 1 Harr. Pra. Chan. 263.—(i) 1797, ch. 70, s. 24. It has been since declared, that where a *scire facias* may be ordered against a corporation to shew cause why its charter should not be vacated, the writ shall issue out of the county court of the county which shall be used by it for keeping its place of business in, &c.—1832, ch. 306, s. 3.—(j) 1818, ch. 195, s. 2.—(k) 1714, ch. 4, s. 2; 1728, ch. 24, s. 2; 1796, ch. 43, s. 14; 1801, ch. 74, s. 11.

judgment against a corporation in a county different from that of its visible and public location, the confession of a judgment in a court not having jurisdiction over the place of its residence, is a fact which should not be overlooked in an investigation of a charge of fraud, alleged to have been perpetrated by means of such a proceeding.

But although this court could not revise or reverse the judgment which *Oliver* had obtained in Anne Arundel County Court, yet its defects and infirmities, as indicated, were so palpable, that as he, himself, declares in his answer, he deemed it a mere nullity, which it was most prudent at once to abandon, and endeavour to authenticate his claim by a correct judgment; and, that, being so advised, he instituted a suit in Baltimore County Court, upon which he obtained that judgment on which he now relies; the proceedings upon which have been stayed by the injunction in this case.

This last judgment of the 26th of May, 1834, was also assailed by these plaintiffs upon the ground of its having been illegally and fraudulently confessed, with an intention, that it should operate as a lien, or mortgage upon the property of the company; and of its being about to be used as a means of having their whole property taken in execution and sold, so as to sacrifice the interests of the plaintiffs; and thus, indirectly to thrust them out from all connection or concern with the body politic. These allegations of the plaintiffs, on the motion to dissolve the injunction, appeared to be sufficiently sustained to have that restriction continued until the final hearing or further order.

But since the passing of that order, continuing the injunction, much testimony has been taken; and the result has been, that the plaintiffs have totally abandoned the original cause of their complaint. And first, by the decree of the 8th of March, allowed their bill to be dismissed; and then, by the decree of the 5th of April, consented, that all the estate of *The Cape Sable Company*, the protection of their interests in which was the sole object of their suit, should be sold for the satisfaction of this claim of *Oliver's*, among others, against that company. Hence, although, it may be true, that this last judgment may have been confessed with an intention that it should operate as a mortgage; and without the consent of three-fourths of the stockholders owning three-fourths of the shares; yet the assent to the decree in this case amounts to a virtual and clear relinquishment of that objection, and to an admission, that this judgment, upon which *Oliver* now

relies, is entirely correct. But as this provision of the act of incorporation, requiring the assent of three-fourths of the stockholders owning three-fourths of the shares, was intended exclusively for the benefit of stockholders, there are no other persons than these plaintiffs, or some other stockholders, competent to make such an objection. Here, however, all parties have consented to this decree; and, consequently, this judgment of *Robert Oliver*, of the 26th of May, 1824, must now be considered as altogether well founded and conclusive.

Charles Carroll also claims as a judgment creditor of *The Cape Sable Company*; and his claims, as No. 2, 3, 4 and 5, have been opposed by objections similar to those directed against that of *Robert Oliver*. But as *Carroll's* claim as a judgment creditor has been, in like manner, put in issue, as fully investigated, and as effectually established by the decree of the 5th of April, as that of *Oliver*, it cannot be now again made the subject of litigation by these plaintiffs, or by any other creditor coming in under that decree.

But *Oliver* insists upon a right to have his claim first satisfied out of these proceeds, on the ground, that his lien upon them is prior to that of *Carroll's*.

These defendants *Love*, *Slye* and the *Barbers*, obtained their judgments against *The Cape Sable Company* in Baltimore County Court at its March term of 1822; and *Carroll* now claims as the assignee of those judgments. But it appears, that executions were issued, on the 2d of September, 1822, on those judgments, and returned *nulla bona* to that court; after which writs of *fieri facias* were issued returnable to April term, 1823, of Anne Arundel County Court. And then, after more than one year had elapsed, without any further proceedings being had, by a writing, filed on the first of June, 1824, it was agreed, that writs of execution should be issued out of Anne Arundel County Court, without any steps being taken to revive them; and on the same day executions were issued accordingly, and levied on the property of *The Cape Sable Company*, which were stayed by the injunction in this case. Immediately after which, on the 4th day of the same month, *Carroll* instituted actions of debt on those same judgments, and obtained judgments by confession on the same day.

Whence it is clear that as no execution could then have been issued on the four original judgments of 1822; the lien which they gave had expired, and was barred by the common law limita-

tion and presumption of satisfaction on the 26th of May, 1824, when the lien arising from *Oliver's* judgment attached. And, therefore, as I have shewn upon a former occasion, ^(l) the lien of those judgments held by *Carroll*, could not have been so revived, even by a *scire facias*, much less by a mere agreement between the parties to them, as to overreach that lien of *Oliver's* judgment, which had, in the interval, fastened upon the real estate of the defendant. Taking it for granted then, that all the proceedings of Anne Arundel County Court, upon those four judgments, held by *Carroll*, were in every respect regular and valid, still *Oliver's* lien is entitled to a preference in satisfaction. But, notwithstanding what *Carroll* has said in his answer, the lien arising from his judgments of Anne Arundel County Court, was virtually relinquished by him, by the institution of the suits and the judgments obtained by him in Baltimore County Court, on the 4th of June, 1824; and, consequently, upon this ground also, *Oliver's* judgment must be respected as a prior lien to that arising from those held by *Carroll*, and must be allowed a preference in satisfaction accordingly.

It is here proper, however, to recollect, that the act of Assembly which enlarges the time within which a *fieri facias* may be issued on a judgment to three years; and, consequently, so far prolongs the continuance of a judicial lien, does not apply to any judgments rendered before the 19th of February, 1824, when that law was passed. ^(m)

But these judgments on which *Oliver* and *Carroll* found their claims were all of them rendered in Baltimore County Court; and it is insisted, that they cannot therefore be considered as liens upon any of the real estate of *The Cape Sable Company*, not lying within the jurisdiction of that court. This is a point of law which it is said, yet remains to be finally determined.

I have, upon a former occasion, endeavoured to trace the origin and fully to explain the nature and extent of a judicial lien within the range of the jurisdiction of the court in which the judgment was rendered. ⁽ⁿ⁾ And it appears, that this lien, which is not given in express terms, by any legislative enactment whatever, is an incident or consequence arising, according to the principles of the common law, from that statute which declared, that lands should be liable to be taken in execution for the satisfaction of such judg-

^(l) *Coombs v. Jordan*, ante 284.—^(m) 1823, ch. 194.—⁽ⁿ⁾ *Coombs v. Jordan*, ante 284.

ments. The lien was considered as necessarily arising from the liability of the land to be taken in execution; and, therefore, the statutes which gave the *elegit*, the statute staple, statute merchant, and recognizance, all alike carried with them this lien, as an inseparable incident of the liabilities they imposed. Hence it was regarded as a general rule, that no such lien could be fastened upon any species of property which was not so liable to be taken in execution. And, consequently, upon the same principles, that no such lien could attach upon any lands lying out of the jurisdiction of the court in which the judgment was rendered, and beyond the reach of any execution which could be issued from it. (o) And this was, in truth, the general rule of the common law in relation to this lien.

The jurisdiction of all courts of common law is confined within certain prescribed territorial limits. They are either themselves, in this respect, circumscribed within particular local divisions; or, if their jurisdiction embraces the whole state, they can only act through the agency of such officers as sheriffs, whose powers extend only over certain counties or districts of the state; and all their process has an express reference to such territorial divisions of the state. (p) Hence it is, that at common law, even criminal process was not allowed to run from county to county; nor was there any civil process emanating from any court, however comprehensive its jurisdiction, which could be directed indiscriminately to all, or to any sheriff, or any executive officer of any other class, to be executed wherever the party or his property might be found within the state.

In England, in all actions instituted in the courts of Westminster, the plaintiff was obliged to give to his cause of action a venue or locality, as well with a view to its being placed in the most suitable situation for trial, as that he should thereby designate those territorial executive officers by whom alone the law could be enforced; and a jury convened for the trial of the disputed facts. (q) And, therefore, although the general jurisdiction of those courts extends over every county of the realm, yet that jurisdiction is nothing more than an aggregation of the several county jurisdictions; for, nothing is within their reach which is not to be found within the body of some one of those counties; and which cannot

(o) *Harris v. Saunders*, 10 Com. Law Rep. 373.—(p) *Kames' Prin. Eq. b. 3, c. 7* and 8.—(q) *Tidd's Prac.* 370; *Mortyn v. Fabrigas*, Cowp. 176.

be taken in execution by an executive officer of a county to whom alone they can direct their process. A writ of *capias* from those courts either to answer, or to make satisfaction, must, in all cases, be directed to an officer of a county where the venue has been laid, or where the cause of action is said to have arisen; and only, on its actually, or by a fiction being supposed to have failed, can a *testatum capias* be sent to any other county. And so, too, a writ of *feri facias* must really, or in form be first sent to the proper county, and if that fails, then a *testatum feri facias*, or an *elegit* may go to any other county where the property of the defendant may be found. (r)

It is by this course of proceeding only that any lands in England can be considered as lying within reach of the process of the several courts of Westminster, as liable to be taken in execution; and, therefore, as being bound by a lien arising from a judgment rendered there. This liability, it is obvious, is, as often as otherwise, by a secondary, and not by a primary and immediate execution; by a *testatum feri facias*, after an antecedent real or *pro forma* writ; and yet it is admitted, on all hands, that a judicial lien immediately fastens from the date of such a judgment upon all the lands of the defendant in every county of the realm. (s) This lien, therefore, is a uniform consequence of the liability, without regard to the mode, direct or indirect, of that liability.

But where the power of the court is confined to certain specified subjects, or within some particularly designated territorial limits its process can reach nothing not falling within the specification of the objects of its power, or which cannot be found within the local limits of its jurisdiction. Hence it is, that the judgment of an inferior court cannot be executed upon any lands or goods out of its jurisdiction; and, consequently, it cannot give rise to any lien upon such land; because it is not, in fact, as to such judgment, in any way liable to be taken in execution under it, either directly or indirectly. (t) For, even if it should be removed into the King's Bench, by *certiorari*, the party must there sue out a *scire facias* to have execution, and therein set forth the nature of his judgment, and specify the particular limits of the inferior jurisdiction, and pray execution only within those limits. If, however, it be removed by writ of error, and is affirmed, it is otherwise, be-

(r) Tidd's Prac. 929, 933; 1 Sellon's Prac. 518.—(s) 1 Sellon's Prac. 519.—(t) Com. Dig. tit. Execution, (I. 1); Holt v. Murray, 2 Cond. Chan. Rep. 243.

cause, by the affirmance it becomes a judgment of the Court of King's Bench; and, as such, an execution may be had thereon co-extensively with the jurisdiction of that court. (u)

But there are cases in which the judgment of an inferior court may be removed into one of the superior courts for the express purpose of enabling the plaintiff, by a more general execution, to reach the property of the defendant lying beyond the limited jurisdiction of the court in which his judgment was obtained. So that although the land of the defendant, lying beyond those limits, could not be taken in execution by any writ issuing directly from such inferior court in which the judgment was rendered; yet as there is a settled and established course by which it may be made liable, the lien fastens immediately, as a necessary consequence of that liability, without regard to the circuitous course whereby alone such liability may be made effectual.

In the case of a statute merchant, statute staple, or recognizance, which, in England, have obtained the name of *pocket judgments*, if the conusor be out of the jurisdiction of the mayor, or cannot be found within the staple, or has no property within those limited jurisdictions, the statute or recognizance may be certified and sent under seal into Chancery, whence execution may be issued against the lands and tenements, goods and chattels of the conusor returnable to the King's Bench, or Common Pleas. And, therefore, in all such cases, the lien fastens from the date of such a pocket judgment; although the mode of making it effectual can only be by removing it from the local tribunal before which it was rendered, and sending it into one of the superior courts, there to obtain an execution to be returned into another of them. (w)

It is obvious, that it could not fail to be attended with very great inconvenience, in most cases, to every one to be sued abroad, or at a distance from his place of residence; and especially where the civil process by which he may be called upon to answer, authorizes an arrest and detention of his person. To subject any one to such a course of judicial procedure within any jurisdiction where he does not reside, places it in the power of malice to have him imprisoned far away from his home, his friends

(u) *Guilliam v. Hardy*, 1 Ld. Raym. 216; *Cowperthwaite v. Owen*, 3 T. R. 657; 2 Harris' Entr. 766.—(w) F. N. B. 246; 2 Inst. 23; Bac. Abr. tit. Execution, B. I. 2; *Holt v. Murray*, 2 Cond. Chan. Rep. 243; 19 Geo. 3, c. 70, s. 4, (1779;) 1835, ch. 201, s. 10, 11 and 12.

and resources; and affords the means of practising much fraud and oppression. To prevent which, and for the facility of traveling, the law of Scotland requires a residence of forty days, to subject even a foreigner to be sued in the courts of that country. (x)

In the year 1714, the Legislature of Maryland, reciting, that the people had greatly suffered by the then war; and that their miserable and deplorable circumstances were very much heightened and aggravated by their being sued and brought to Annapolis from the remotest parts of the province, to their manifest oppression and impoverishment, among other things, enacted, that where the debt or damages did not exceed twenty pounds sterling, the debtor should only be sued in the county court of the county in which he resided, and not elsewhere; (y) which act was, from time to time, continued and revived until the year 1794, when it was suffered to expire. (z) This act, however, provided only a partial remedy for the evil it proposed to remove; and therefore, afterwards, on its being represented to the General Assembly as a very great grievance to the people, that there was not a sufficient provision made against arresting them when they happen to be found about their necessary affairs out of the county where they reside, it was enacted, that no inhabitant should be arrested by a *capias ad respondendum*, or a *capias ad satisfaciendum*, out of the county in which he resided, until after a return of *non est* on such writ. (a)

This law applied to all such writs, from whatever court they might issue; and therefore, although the jurisdiction of the General Court, then in existence, extended over the whole state, this law made it necessary, that its process, for the arresting of a defendant, should be first directed to the county in which he resided; and consequently, as in England, a *testatum capias*, or a process in nature of such a writ, was the only one which, in many cases, could be sued out. And upon the principles of the English law, it is obvious, that the General Court must have used an execution, if not precisely the same, yet in all respects equivalent to a *testa-*

(x) Kames' Prin. Eq. b. 3, c. 8, s. 1; Utterton v. Tewsch, 3 Eccle. Rep. 351; Gordon v. Pye, 3 Eccle. Rep. 450, 463.—(y) 1714, ch. 4.—(z) 1773, ch. 17.—(a) 1728, ch. 24; 1796, ch. 43, s. 14; 1801, ch. 74, s. 11.—Where the suit abates by the death of a defendant, his executor or administrator may, to revive the suit, be summoned from any other county of the state.—1812, ch. 145, s. 4. And as it would seem a party may be arrested by virtue of an attachment any where in the state and brought before the High Court of Chancery.—Crapster v. Griffith, 2 Bland, 15.

tum fieri facias; because two or more writs of *fieri facias* could not be issued from that court, any more than from the King's Bench, at the same time directed to two or more different counties; but could only go consecutively to the same or to different counties, until an entire satisfaction was produced; (b) and yet it was never doubted here, that a judgment rendered in the General Court gave rise to a lien upon the defendant's lands in every county of the state.

But according to these laws, in those cases where the suit could be brought no where else than in the court of the county in which the defendant resided; and, in all other cases where it was in fact brought there, all the process of the county court, being, by the general principles of the common law, confined within its local limits, it followed, as a necessary consequence, that no property of the defendant, not to be found within such county, could be taken in execution, in satisfaction of such a judgment; and therefore, that no judgment of a county court could operate as a lien upon any of the lands of the defendant lying out of that particular county; unless there was here, as in England, some means of removing the judgment into some superior court from which a more general and comprehensive scope of executive process might be taken.

It seems to be not altogether improbable, that some such course of proceeding, at one time, might have been allowed and pursued here. For, it is declared, by one of the Provincial acts of Assembly, that when any person against whom any judgment shall be given, in any county court, shall fly, remove, or absent himself out of the jurisdiction of that court, that then the plaintiff, for the more easy obtaining of the fruit of such judgment, may take the transcript of the record of such judgment, under the seal of the court, and lay the same before the county court where the defendant shall happen to be, which transcript shall be entered upon the records of such county court, who shall award execution thereon by a *capias ad satisfaciendum*, *fieri facias*, or attachment for the debt, damages, and costs, together with the additional costs of such court, 'without suing out any writ of *scire facias*.' (c) From which last expression, dispensing with a *scire facias*, it would

(b) 1 Sellon's Pra. 536; Bullock v. Morris, 2 Taunt. 67; Waters v. Caton, 1 H. & McH. 407; Coombs v. Jordan, ante 321.—(c) 1715, ch. 41, s. 8, probably re-enacted from 1701, ch. 1.

seem to be allowable to infer, that some such practice had prevailed here, as in England, as that of removing a judgment from a county court to the General Court, and suing out a *scire facias* for the purpose of obtaining an execution from that court, as upon its own judgment. (d)

But however that may have been, it is clear, that no execution, of any kind, could be issued under this act upon any judgment rendered in a county court, and be executed in another county, or made returnable into another county court, unless in pursuit of a defendant who had himself given a proper foundation for such a course of proceeding by flying, removing, or absenting himself from the jurisdiction of the county court in which the judgment had been obtained. And therefore, it is sufficiently clear, that this law, which was intended to meet a peculiar and extraordinary state of things, cannot be considered as having prescribed any regular course of proceeding whereby the lands of a debtor might be made liable to be taken in execution. And besides it must be borne in mind, that the statute subjecting lands to be taken in execution by a *fieri facias*, did not pass until the year 1732; (e) that at that time lands could only be taken in execution by a writ of *elegit*; and that this act specifies only such executions as could then only go against the person, or the personal property of the defendant. Whence it is clear, that there is nothing in this law which can be considered as having so enlarged the force of a judgment of a county court, as to render any lands liable to be taken in execution under it which were not liable before; and consequently, it gave no lien upon any lands of the defendant lying beyond the jurisdiction of such county court.

By an act of Assembly, passed during the revolution, it is declared, that the clerk of a county court shall, on application of the plaintiff in any judgment of his court; issue execution against any defendant who hath removed from the county in which such judgment is had to another county; which execution shall be directed to and served by the sheriff of the county where such defendant may reside, and returned to the court of that county; and it shall be sufficient for the plaintiff to entitle himself to the benefit of such execution to produce before the court to which the same shall be returnable, a short copy of his judgment attested by the clerk. (f)

The course of proceeding prescribed by this act does, in like

(d) 2 Inst. 23; *Guilliam v. Hardy*, 1 Ld. Raym. 216.—(e) 5 Geo. 2, c. 7.—(f) October, 1777, ch. 12, s. 3.

manner, altogether depend upon the movement of the defendant ; and his thus, of himself, laying that foundation of fact which alone can authorize a plaintiff to proceed in the manner pointed out by it. (g) But, as at this time lands were liable to be taken in execution under a *feri facias* ; and as this act authorizes a plaintiff, in such manner, to sue out any kind of execution he may think proper, it may be considered, that such a judgment would give rise to a lien upon the lands of the defendant, lying in the county to which he had removed, from the time of his having become a resident of it, as well as upon all his lands lying within the jurisdiction of the county court of that county in which the judgment had been rendered. But although it might be so held, in regard to the lands of the defendant lying within those two counties ; yet, as, under this act, no execution could be sent to any other county, the judgment could not therefore, operate as a lien upon any lands of the defendant lying elsewhere.

But, whatever doubts or difficulties may have previously existed upon this subject, all, or the greater part of them, have been removed by an act of Assembly, which declares, that the clerks of the county courts shall, on application of the plaintiff in any judgment in their courts, upon return of *nulla bona* on a *feri facias*, in the county where such judgment hath been obtained, issue execution thereon against the goods and chattels, land and tenements of any defendant lying and being in any other county than that in which such judgment was obtained ; which execution shall be directed to and served by the sheriff of the county in which such goods and chattels, lands and tenements may be ; and that it shall be sufficient for the plaintiff to entitle himself to the benefit of such execution to produce before the court to which the same shall be returnable, a short copy of the judgment attested by the clerk. (h) And it is further provided by another act of Assembly, that the same proceedings may be had upon the return of such execution in the county court of the county to which it has been sent, as if it had been issued on a judgment obtained therein ; and may if necessary be renewed from that court. (i)

These legislative enactments were manifestly and expressly intended, so to enlarge the force and operation of judgments, obtained in the county courts, as to make all the property of the

(g) *Harden v. Moores*, 7 H. & J. 4.—(h) 1794, ch. 54, s. 9.—(i) 1795, ch. 23, s. 1 ; *Harden v. Moores*, 7 H. & J. 4.

defendant, wherever it might be found, within any one of the counties of the state, liable to be taken in execution for the satisfaction of such judgments. No execution can be issued, under these laws, against the person of the defendant, to any county, but to that in which he resides, as directed by the previous enactments; nor can a plaintiff be allowed to issue writs of *fiery facias* directed to two or more counties at the same time, although it may be renewed, or continued, either on the original judgment, or on the short copy of it sent to another county, until full satisfaction has been obtained; in like manner as by a *testatum fiery facias* issuing, according to the English law, from the Court of King's Bench to any county of the realm, into which it may be necessary that an execution should go, in order to extract from the property of the defendant that satisfaction to which the plaintiff by his judgment is entitled. And, according to the principles of law which have been applied in all similar cases, as well here as in England, the lands and tenements of the defendant having been thus expressly made *liable*, by a regular course of proceeding, to be taken in execution, are all, wherever they may be, within any one of the counties of the state, bound by a lien which fastens upon them from the date of any such judgment rendered in any county court. (*j*)

When these laws, enlarging the operation of judgments rendered in the county courts, were passed, the General Court was in existence, the power of which, as a court of original jurisdiction, extended over the whole state; and from which, as setting on the western or eastern shore, an execution might be sent, upon its judgments, to any one of the counties of the state, against the property of the defendant. The Court of Chancery also, being then, as it is now, and always has been, a court having original jurisdiction over the whole state, having been authorized to enforce its decrees by a *fiery facias*, directed to any county of the state, against the goods and chattels, lands and tenements of the defendant; (*k*) thereby had its decrees likewise made a lien upon the defendant's lands every where, to the same extent as a judgment of the General Court. (*l*) And the court of Appeals having been authorized to pronounce such a judgment as the inferior court of common law might have done, and to issue execution thereon to any

(*j*) *Ralston v. Bell*, 2 Dall. 159; *Eppes v. Randolph*, 2 Call. 186; *Nimmo v. The Commonwealth*, 4 Hen. & Mun. 77.—(*k*) 1785, ch. 72, s. 25.—(*l*) *Coombs v. Jordan*, ante 284.

county of the state, returnable formerly to the General Court; (*m*) and now before itself; (*n*) were all alike liens upon the real estate of the defendant every where. Whence it appears, that these last mentioned acts of Assembly; (*o*) did no more, in effect, than to harmonize our code by giving to all judgments and decrees, whether of the County Court, the General Court, the Court of Chancery, or the Court of Appeals, the same efficacy against the real estate of the defendant in whatever county of the state it might be found; and consequently gave a lien which fastened upon it from the date of such judgment or decree.

If it were at all necessary or expedient to give to the judgments of all the courts of the state the same pervading efficacy, during the existence of the General Court, when there was a court of common law whose jurisdiction extended over the whole state, and in which a judgment with such a wide spread lien, might have been obtained, it certainly is much more so now, since that court has been abolished; and particularly as the affirmance of a county court judgment places it in the power of the party to obtain execution from the Court of Appeals, and thus to give to his judicial lien an effect co-extensive with the range of the process of that court. And when it is recollected, that no inhabitant can be arrested or sued in any other county than that in which he resides, it will be seen, that this general operation of the lien, arising from the judgment of a county court, can be attended with little or no inconvenience or hardship to a purchaser, or to any one else; because such a judicial lien can only originate, and therefore must necessarily be found of record in the county court of the county in which the defendant resided at the time of the institution of the suit.

But as a suit may be brought against one who absconds or who is not an inhabitant of Maryland, in any county court of the state, it may be inconvenient to ascertain the existence of a judicial lien upon any lands held by him in this state; it is, however, an inconvenience arising out of the peculiar nature of things, and could not be avoided without very injuriously trenching upon the rule which has established the generality of such liens. These remarks may be applied with the same force to an executor or administrator, supposing him to be bound, as in England, to take notice, at his peril, of all judgments and decrees against his testator or intes-

(*m*) 1800, ch. 69.—(*n*) 1810, ch. 156.—(*o*) 1794, ch. 54; 1795, ch. 23.

tate. (p) But our law, although it directs judgments and decrees to be first paid, expressly protects executors and administrators, who proceed as the law directs, as well from the claims of judgment creditors, as of all others of which they had no notice. (q)

From all that has been said, it is therefore clear, that these judgments obtained by *Robert Oliver* and by others, to the use of *Charles Carroll*, in Baltimore County Court, gave them a lien in virtue thereof upon all the real estate of *The Cape Sable Company* lying in Anne Arundel or any other county of the state.

The act of Assembly by which these defendants *The Cape Sable Company*, were incorporated, declares, 'that the lands, tenements, stock, property, and estate of *The Cape Sable Company*, is and shall be held as real estate, and shall descend as such agreeably to the acts of Assembly in such cases made and provided, when not otherwise disposed of.' (r) And the trustees who made the sale of their estate under the decree in this case, in their report describe it as consisting of lands, of slaves, of horses, of the implements of the manufactory, &c.; that is, of real estate technically and properly so called, and of mere perishable personalty.

It would seem to be perfectly clear, according to the first branch of this section of the act of incorporation, that this mere perishable personalty is as much a part of that stock, property, and estate of *The Cape Sable Company*, which it is declared shall be held as real estate, as their lands and tenements; and that it must be so treated as far as practicable, whatever inconveniences may ensue. But it is added, that the estate shall descend as such when not otherwise disposed of; thereby indicating it to have been the intention of the act, that it should only be so held as regarded the interests of the stockholders themselves; and as real estate to descend accordingly from them; not that the actual legal character of the perishable moveables should be changed as well in regard to the rights and interests of all other persons as the stockholders themselves. (s)

It was upon this ground, that I ordered the sheriff's poundage fees to be rated and ascertained; distinguishing as the law directs, in that respect, between the real and personal property taken in execution. It was upon that ground also, that the injunction in

(p) *Searle v. Lane*, 2 Vern. 88; *Nimmo v. The Commonwealth*, 4 Hen. & Mun. 57.—(q) 1798, ch. 101, sub ch. S, s. 15, 17; 1802, ch. 101, s. 8.—(r) 1818, ch. 195, s. 8.—(s) *Binney's case*, 2 Bland, 146.

this case operated ; by virtue of which the perishable personal property taken in execution was delivered back, as directed by the act of Assembly. And therefore, upon the same principles, that this provision of the act of incorporation has made no alteration in the legal character of the several kinds of property of which the estate of *The Cape Sable Company* was composed, it follows, that the liens of *Oliver* and *Carroll* can only attach upon their real estate ; and that their personal property was only bound from the day of the delivery of the executions to the sheriff.

But that lien upon the personalty was broken and entirely disengaged by the injunction, in virtue of which it was delivered back to the owner. And although the sale under this decree gave to the sheriff a well founded equity, as has been explained, to come here and obtain satisfaction for his poundage fees ; yet I do not perceive any thing in this case which can give to *Oliver* and *Carroll* a right to claim a preference in satisfaction out of these proceeds of sale, upon the foundation of that lien upon the personalty which they once held by virtue of their executions, and which has been destroyed by the injunction. Because, upon a dissolution of the injunction the personal property would not be thereby so restored to the custody of the sheriff as to justify him in selling it under the same execution, or to authorize the plaintiff to sue out a *venditioni exponas* ordering him to sell it ; nor can *Oliver* and *Carroll* claim any such preference upon the ground of their having been deprived of that advantage by this decree ; because it was passed with their express consent, and without the slightest reservation to that effect.

It is therefore, evident, that the claims of *Oliver* and *Carroll* to a preference of satisfaction in virtue of their judgments, must, if practicable, be confined to the proceeds of the sale of the *real* estate of *The Cape Sable Company* ; and that as regards the proceeds of the sale of the *personal* estate, they can be allowed to take no higher ground than any of the other creditors of the company.

But no one of the parties now here has adverted to this distinction, and objected to the claims of *Oliver* and *Carroll* to have satisfaction in preference to all others out of the proceeds of the *personalty* upon the ground, that they, in fact, had no lien upon the personal estate of *The Cape Sable Company* after the injunction was served. Why such an objection has not been made, it is not for this court to say. But from the report of the trustees who made the sale under the decree, or from the whole of the proceed-

ings and proofs, as they now stand, and upon which all parties have united in calling for a decision of the court, it would be utterly impossible to make any such distinction as regards their claim; because it does not appear, nor has the court been furnished with any means of ascertaining what proportion of the purchase money, now about to be distributed, was agreed to be paid for the *real estate*, and what proportion for the *personalty*.

Therefore those who have thus stood by, and acquiesced in these two different kinds of the estate of their debtor being undistinguishably blended and mingled, must abide the consequences; and as the rights of these judgment creditors cannot be jeopardized or impaired by any fault, not their own, they must be allowed to obtain satisfaction, to the full extent of their respective liens in preference to all others, from the whole amount now about to be distributed.

These plaintiffs and several of these claimants have, by their exceptions to the auditor's report, relied upon the statute of limitations as a bar to some of the claims made against *The Cape Sable Company*. But the statute of limitations, or any other defence, cannot be resorted to by him who has already chosen his defence, rested his case upon it; and suffered the case so to proceed; or had a hearing or decision upon such defence; because if a party were allowed to avail himself first of one defence and then of another, there would be no end to litigation. (t) Therefore all these exceptions against the claims of *Oliver* and *Carroll*, must be rejected; even supposing they were now open to such an objection as the statute of limitations, as they are not.

According to the rule laid down for the government of this court, however, a plea of the statute of limitations can only be allowed to enure to the advantage of him by whom it is pleaded. (u) But, if upon this principle the full operation of the plea, or indeed of any other objection, would completely exclude a claim; and yet would afford to him by whom it was pleaded or made, no sort of benefit; either because his own claim could not be sustained, or because, being established, it could not be in any way affected by the allowance or rejection of the claim against which the plea or objection was directed, then it would be tolerating mere wanton mischief to allow such a creditor to disappoint his co-creditor from

(t) *Bennet v. Lee*, 2 Atk. 529; *Welch v. Stewart*, 2 Bland, 37.—(u) *McCormick v. Gibson*, ante 499, note.

obtaining satisfaction, when he, himself, could derive no possible advantage from it. For, after the claim of a creditor has been rejected or satisfied, he is, as to the surplus, a mere stranger, and cannot be allowed to interfere with the distribution of it in any way whatever.

Therefore these pleas of the statute of limitations, as well as all other objections, as coming from *Oliver*, *Carroll* and *O'Hara*, and directed against the inferior claims No. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16, must be entirely overruled.

It is a rule of this court, that in all cases where any one is chargeable under a creditor's suit as a surety, the creditor must prove the insolvency of his principal debtor before he can be allowed to obtain any satisfaction from the proceeds of the estate of the surety then about to be distributed; and it is enough, as in this instance, that the parties do, in fact and in equity, stand in that relation towards each other; although the contract may not have that aspect, according to the strict and technical rules of the common law. (*w*) Upon this ground the claim of *George Neilson*, administrator of *James Neilson*, deceased, No. 6, must be rejected, there being no proof of the insolvency of the principal debtors.

An express and distinct acknowledgment of the debt by the debtor himself has, in most cases, been deemed sufficient to prevent the operation of the statute of limitations. Under a creditor's bill, and in cases of that kind, as this is, although the court will not deny to any one the benefit of any such acknowledgment for the purpose of resuscitating his claim; yet such an acknowledgment will not be permitted to have any such effect where there is just ground to believe, that there has been any collusion in procuring it to be made with a view to injure or lessen the dividends of other creditors. But here, this claim of *Eli Balderson*, No. 11, is not taken out of the statute of limitations, which has been relied on, as against it, by the plaintiffs, by *Lechleitner*, and by others, by a mere acknowledgment; but by materials or testimony in its support furnished by the debtor company themselves; and, therefore, this claim must be allowed.

It sufficiently appears from the deed of the 25th of September, 1813, and the proofs referred to by the auditor, that *Lechleitner* and *Troost* were the partners, of the second part, of those who constituted the association of *Richard Caton*, *John Gibson* and others;

(*w*) *Watkins v. Worthington*, 2 Bland, 509.

and that the partnership, so formed was, by the express stipulation of that deed, to continue for the term of ten years; which term, therefore, did not expire until the 25th of September, 1823, after the 5th of April, 1819, the day on which those who constituted the association of *Richard Cuton, John Gibson* and others, were regularly organized as a body politic, by the name of *The Cape Sable Company*, under their act of incorporation. (x)

It is true in general, that where a partnership is formed for a definite period of time, it can only be dissolved by the consent of the parties, or by the effluxion of the specified period of time. (y) But, if one of the contracting parties refuses to continue the partnership, or does an act which renders its further continuance impracticable, it must be then terminated; and the only remedy of him who wished its continuance, is upon the contract for a compensation in damages for the injury he has thereby sustained. (z) A partnership for a definite period may be determined before the specified time has elapsed, either by the act of God, as by the death or the habitual mental insanity of one of the partners; or of the government, as by a declaration of war between the countries of the parties; (a) or it may be terminated by the misfortune, or by the illegal or fraudulent conduct of a partner, as by his insolvency or bankruptcy. The partnership is held to be thus absolutely terminated; because, it is deemed unjust, that the surviving or solvent partner should have a stranger intruded upon him in place of him in whom he had confided, and with whom he had, therefore, associated himself; and also, because it would be in a great degree or altogether impracticable to continue the partnership after such an event, upon the terms on which it was originally formed. (b)

Here the association, constituted of *Richard Cuton, John Gibson* and others, have virtually refused to continue the partnership they had formed with *Lechleitner* and *Troost* any longer, by transferring all their estate to a newly erected body called *The Cape Sable Company*; and by taking upon themselves the capacities of that body politic they have virtually and effectually cast off all connexion with their former partners *Lechleitner* and *Troost*. (c) By an express provision of the act of incorporation, by which they have

(x) 1818, ch. 195.—(y) Collyer Part. 57.—(z) *Skinner v. Dayton*, 19 John. 533 — (a) *Griswold v. Waddington*, 15 John. 57.—(b) Collyer Part. 58; *Marquand v. The New York Manufacturing Company*, 17 John. 525.—(c) *Bethel Church v. Donnom*, 1 Desau. 154.

been clothed with this new capacity, it is declared, that nothing therein contained should exempt any member, or members of the company from any liability in his, her, or their individual capacity for or on account of any contract or contracts theretofore made.

Hence it is manifest, that their liabilities in their natural capacities, as the association of *Richard Caton*, *John Gibson* and others, were to be in no way impaired, or in any manner blended with those of their new and artificial one called *The Cape Sable Company*. The two being absolutely distinct, and being intended to be kept entirely so. The contracts of the association separately or of the association together with their partners *Lechleitner* and *Troost*, could have, of themselves, no connexion whatever with those of *The Cape Sable Company*. (d) And besides this body politic, as a new and artificial stranger, could not be intruded upon *Lechleitner* and *Troost* as a partner in place of the association of *Richard Caton*, *John Gibson* and others, with whom they had connected themselves. It is not only an artificial stranger to the partnership formed under the deed of the 25th of September, 1813; but it is a corporation of a very peculiar and limited character. It cannot dissolve itself, or dispose of or mortgage its property, or engage in any other manufactory, except that of alum and copperas, without the consent of three-fourths of the stockholders holding three-fourths of the shares; whence it is evident, that it would be impracticable to introduce this body politic as a substitute for the association constituted of *Richard Caton*, *John Gibson* and others, and to place it in the same position which that association occupied according to the terms of the contract between that association and *Lechleitner* and *Troost*; (e) and therefore the partnership must be considered as having been dissolved on the 5th day of April, 1819, when all the rights and interests of the association were regularly transferred to the body politic.

There is no proof of any contract of partnership between *Lechleitner* and *Troost*, or either of them, and *The Cape Sable Company*, after that day; or of that company's ever having assumed upon themselves the payment of any debt due from the association to *Lechleitner* and *Troost*, or either of them; and consequently, so much of these claims as originated before the organization of *The Cape Sable Company*; and which is not founded on any express or

(d) 1 Fonb. Eq. 308; *Dance v. Girdler*, 1 New Rep. 35.—(e) *Marquand v. The New York Manufacturing Company*, 17 John. 525.

implied contract with that company itself, must be rejected ; and the auditor must be directed to restate the accounts of *Lechleitner* and *Troost* accordingly.

Whereupon it is *Ordered*, that this case be and the same is hereby referred to the auditor, with directions to state an account, in which, after deducting the costs, the trustees' commissions and expenses, as usual : and the claims heretofore ordered to be paid, he will allow the claim No. 1 of *Robert Oliver* as a judgment creditor entitled to a preference from the 26th of May, 1824 ; and *Charles Carroll's* claims No. 2, 3, 4 and 5, as on judgments entitled to a preference from the 4th of June, 1824 ; he will then restate the claim of *Gerard Troost*, No. 14 ; and also that of *Philip G. Lechleitner*, No. 15 and 16, rejecting therefrom every portion of them which arose prior to the 5th day of April, 1819 ; and which is not founded on some express or implied contract with *The Cape Sable Company*, and which as such may not then be sufficiently authenticated. And these claims, if any such should be ascertained to exist after being thus restricted, together with the claim of *Hugh Mullen*, No. 9 ; of *Eli Balderson*, No. 11 ; of *Mary Mullen*, No. 12 ; and of *Edme Ducatel & Sons*, No. 13, are to be allowed in due proportion of the residue of the proceeds of sale after the preferred claims of *Oliver* and *Carroll* shall have been satisfied according to their respective priorities. And he will reject the claim of *George Neilson*, administrator of *James Neilson*, deceased, No. 6 ; the claim of *Leonard Foreman*, No. 7 ; the claim of *Benjamin Welsh*, No. 8 ; and also the claim of *James A. Sangston*, No. 10.

Soon after which the auditor made and reported a distribution of the proceeds as directed by this order, which was confirmed on the 21st of September, 1832 ; and all the exceptions of the parties at variance with it overruled. A final disposition was thus made of the case ; and the corporation called *The Cape Sable Company*, having been thus totally divested of all its property was thus virtually dissolved, and finally extinguished.

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Held to give rise to a resulting trust in favour of the father, so as to require the son to shew, that the specified creditors had been satisfied.—*Neale v. Hagthorp*, 580.

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A discount in bar, if not distinctly specified and admitted, must be shewn and established by him who is to benefit by it, or it will be rejected.—*Simmons v. Tongue*, 355.

DOWER.

On the petition of a widow in a creditor's suit a commission may be issued to assign to her, her dower.—*Simmons v. Tongue*, 344.

A devise in lieu of dower, considered as dower, and if not insisted on by the widow in a creditor's suit, the real estate, as usual, sold clear, leaving her to come in for the value of her dower out of the proceeds of sale.—*McCormick v. Gibson*, 501.

The rules for estimating the value of dower considered and explained.—*Williams' case*, 221, 281.

EMINENT DOMAIN.

By virtue of the power of *eminent domain* private property may be taken for public uses; but private property cannot be taken from one and given to another in any way.—*Hepburn's case*, 98; *Williams' case*, 204; *The Bellona Company's case*, 451.

The usual provision in land and canal acts, for the condemnation of private property held to be a substitute for the writ of *ad quod damnum*.—*Compton v. The Susquehanna Rail Road*, 359.

The clause of an act of incorporation which gives the power of *eminent domain* to be construed strictly but fairly.—*The Bellona Company's case*, 448.

The property of a corporation as well as that of an individual, is subject to the power of *eminent domain*, 449.

What is such a public use as authorizes the so taking of private property, 451.

Where there are several public uses the exercise of the power may be so limited as to preserve them all, 452.

ESTATE.

A man may have an estate of inheritance in land so long as such a tree shall grow.—*Patterson v. McCausland*, 72.

EVIDENCE.

The law respects the regular course of nature, and a presumption arising from such a known course held to be good evidence.—*Patterson v. McCausland*, 71.

It not having been established that the concentric layers in the trunks of trees

are regular annual formations, the number of them found in the trunk of a boundary tree cannot be received as evidence of the lapse of any given time, 69.

No one can be allowed to discredit his own testimony.—*Hepburn's case*, 106.

An interrogatory, in the nature of a cross bill, propounded by a defendant to a plaintiff, answered by the monosyllable, yes.—*Salmon v. Clagett*, 130.

On a motion to dissolve an injunction no *ex parte* affidavits or proofs admitted, 132.

No one can be compelled to criminate himself, 144.

It is a privilege of a client, that no facts communicated by him shall be disclosed by his attorney or solicitor, 145.

A defendant is not bound to produce by way of answer any public documentary evidence of which he is the official keeper, 145.

The legality of evidence brought out by a bill of discovery must be determined by the court of common law for whose use the discovery was made.—*Price v. Tyson*, 405.

Husband and wife are incompetent witnesses for or against each other, as well after as during the coverture, 405.

Where evidence is to be taken a reasonable time to collect it is allowed as of course.—*McKin v. Odom*, 412.

A summons issued by commissioners requiring a witness to attend and testify before them under a commission to take evidence, is a process which must be served by the sheriff.—*Deale v. Estep*, 439.

Upon the return of a *subpœna duces tecum* the person summoned may shew cause; but, if overruled, must produce the document.—*Randall v. Hodges*, 478, 485.

The documents and vouchers upon which an account has been passed by the Orphans Court, form no part of its records; and therefore, if they have been lodged with the Register of Wills, he may be compelled, by a *subpœna duces tecum*, to produce them, 483.

The effect of an endorsement of partial payment as evidence to take a case out of the statute of limitations.—*Post v. Mackall*, 522.

An order to take evidence to establish claims in a creditor's suit, 496.

Where there is no proof of the exact time, a medium must be assumed.—*Neale v. Hagthorp*, 583.

EXECUTION.

In general where a man may alien his real estate it may be taken and sold under an execution against his property.—*Coombs v. Jordan*, 299.

Chattels real, like mere moveables, are

liable at common law to be taken and sold under a *fiery facias*, 300.

Where a man by writing under seal, binds himself and his heirs to pay money, his lands in the hands of his heir may, at the common law, be taken in execution to satisfy the debt, 301.

An imperfect legal title in the land office, considered as a chattel real and liable to be taken in execution at common law, 303.

The statute subjecting lands to be taken in execution and sold, considered and explained, 304, 309.

Real estate cannot be sold under an execution from a justice of the peace, 309.

Growing crops and emblements may be taken and sold under a *fiery facias*, 312, 313.

What kind of incorporeal hereditaments may be taken in execution, 315.

Some kinds of interests in real estate cannot be taken and sold under a *fiery facias*, 316.

The power to issue writs of *capias ad satisfaciendum* and *fiery facias* given to the Court of Chancery, to the like extent as used by the courts of common law, 321; *The Cape Sable Company's case*, 638.

A *capias ad satisfaciendum* and a *fiery facias* may be at once sued out upon a judgment or decree, so that they be not both executed at the same time.—*Coombs v. Jordan*, 321; *The Cape Sable Company's case*, 665.

From the complex nature of some decrees it may not be practicable to enforce them entirely by a *fiery facias*.—*Coombs v. Jordan*, 321.

After the dissolution of an injunction the realty which had been previously taken may be sold under a *venditioni exponas*.—*The Cape Sable Company's case*, 638.

The personal estate being the natural fund for the payment of debts, should, although not so expressly ordered by law, as far as practicable be first taken in execution.—*Tessier v. Wyse*, 39, 42; *The Cape Sable Company's case*, 640.

EXECUTORS AND ADMINISTRATORS.

An executor or administrator regarded in equity as a trustee; yet has an unqualified ownership of the assets to a certain extent.—*Salmon v. Clagett*, 169; *Neale v. Hagthorp*, 565.

Every person who acquires personal assets by a breach of trust or *devastavit* in the executor or administrator is responsible to those entitled.—*Salmon v. Clagett*, 169.

No one who joins in a deed with the administrator in mortgaging the assets can, as next of kin, complain of their misapplication, 170.

An instance in which it would seem, that a fee simple estate might become assets in the hands of an executor.—*Coombs v. Jordan*, 300.

An imperfect legal title in the land office, considered as a sort of chattel real and assets in the hands of the executor, 303.

The personal estate must be so disposed of as to leave no superannuated slave as a burthen upon it or the public.—*Post v. Mackall*, 526.

The marshalling of assets, in what cases it may be made without prejudice to the creditors, 502.

An administrator *de bonis non* can recover only such assets as have not been converted or distributed by his predecessor.—*Neale v. Hagthorp*, 562.

Although the next of kin have a vested interest in the surplus, they can only make title, or recover from or through an administrator, 564.

An executor or administrator may answer according to his belief, 568.

FIXTURES.

What are so considered as, between vendor and vendee; landlord and tenant; or heir and executor.—*Coombs v. Jordan*, 311.

HIGHWAYS.

All laws in relation to canals and other highways are public laws of which the court must take notice.—*Bosley v. The Susquehanna Canal*, 65.

A right of way is nothing more than a special and limited right of use; all else belongs to the fee simple owner, 67.

A toll for the use of a highway, wharf, or market, is in the nature of a tax which cannot be levied without the express sanction of the General Assembly.—*The Wharf case*, 375, 380.

The usual provision in road and canal acts for the condemnation of private property, held to be a substitute for the writ of *ad quod damnum*.—*Compton v. The Susquehanna Rail Road*, 389.

IMPROVEMENTS.

Under the head of just allowances a mortgagee or trustee in possession is allowed for necessary repairs, and permanent improvements.—*Neale v. Hagthorp*, 590.

The value of such improvements to be estimated as of the day when the plaintiff obtains possession of them, 591.

INFANTS.

The cases in which the parol shall demur, and how altered by act of Assembly.—*Tessier v. Wyse*, 41, 49; *Anderson v. Rawlins*, 41.

The mere fact of an infant's having attained his full age is not a ground for

- rehearing in a creditor's suit.—*Tessier v. Wyse*, 61.
- Although an infant who attains his full age pending a suit may be allowed to come in as of course and demur, plead, or answer; yet he cannot be permitted to do so in a creditor's suit after a decree, 62; *McCormick v. Gibson*, 501.
- An infant plaintiff can make no admissions by his not replying to the answer.—*Salmon v. Clagett*, 141.
- A deed may be treated as a nullity as to an infant who had signed it, in regard to any claim against him; but he can have no relief, if he claims none, 171.
- How far the court has gone, upon general principles, or has been authorized to go, by general or special legislative enactments, in applying the principal of an infant's estate to his maintenance and education.—*Williams' case*, 189.
- An infant's personality may be converted into realty, or the timber and mineral part of his real estate may be converted into personality; but not his real estate of inheritance, 190, 193, 204.
- The acts of Assembly which authorize the sale of the real estates of infants considered as to their true construction; their practical utility, and their constitutionality, 199, 209.
- Where under those acts, the widow who is the guardian of the infants, is the petitioner, her assent to the sale is implied, 210.
- The credit given on the sale of an infant's real estate, considered as an investment for his benefit, 211.
- The sale of an infant's mortgaged estate must always be for his benefit, 194.
- The capital of an infant's personal estate broken in upon, and the dividend of the proceeds of the sale of his real estate paid to him to enable him to prosecute his professional studies, and to put him out in life, 193; *Hanson v. Chapman*, 198.
- No part of an infant's real estate to be diminished without the approbation of the Court of Chancery as well as the Orphans Court.—*Williams' case*, 200; *Gottier's case*, 200.
- Females of age for certain purposes at eighteen or day of marriage; why this provision.—*Williams' case*, 219, note.
- But on the ground of the great lapse of time after the abatement, the defendant may move at once for a dissolution, 24.
- An injunction may be granted on an *ex parte* application on the bill alone, notwithstanding an apparent misnomer of the corporation.—*Bosley v. The Susquehanna Canal*, 64.
- An injunction before answer does not order the defendant to do or to undo any thing, 65.
- Nothing can be deemed a breach of an injunction forbidding the disturbance of a peculiar right of way which does not interfere with its free exercise, 68.
- A motion to dissolve the injunction and exceptions to the answer may be taken up together and determined at the same time.—*Salmon v. Clagett*, 131.
- How an injunction may be obtained, and how dissolved on bill and answer, 159, 161.
- The difference between the combination of facts which gives rise to the equity upon which the injunction rests, and that which gives rise to the equity upon which the plaintiff asks relief, 159.
- On a motion to dissolve, the court is confined to the answer so far as it is responsive, putting aside all matter in avoidance, 132, 162; *The Bellona Company's case*, 445.
- An injunction may be granted to protect mortgaged property before the mortgage debt becomes due.—*Salmon v. Clagett*, 180.
- On a motion to dissolve, no *ex parte* affidavits or proofs admitted, 132; *The Bellona Company's case*, 445.
- An injunction dissolved as to the amount due, and made perpetual as to credits not given.—*Beard v. Williams*, 163.
- Where each of the litigating parties claims a right to demand wharfage for the use of a public wharf, for the use of which no toll can be demanded, they must both of them be perpetually enjoined from collecting wharfage.—*The Wharf case*, 380, 384.
- After an appeal had been taken, the plaintiff, on dismissing his appeal, allowed to amend his bill, on which a new injunction was granted on terms.—*McKim v. Odom*, 413.
- An injunction granted to stay trespass, there being no then depending suit to try the right, dissolved on the coming in of an answer which denied the trespass, and alleged that the acts complained of were done on his the defendant's own land.—*Stewart v. Chew*, 441.
- On the filing of a bill the defendant may instantly put in his answer, so as thereby to prevent the granting of an injunction.—*Hall v. McPherson*, 531.

INJUNCTION.

- An injunction to stay proceedings at law against the party will not be granted without bond.—*Walsh v. Smyth*, 13.
- No bond is required in certain cases on the granting of an injunction to stay execution at law.—*The Cape Sable Company's case*, 615.
- Where the suit abates by the death of a plaintiff, the injunction not to be dissolved without notice.—*Walsh v. Smyth*, 23.

Where there are two or more defendants the injunction will not, in general, be dissolved on motion until all have answered.—The Cape Sable Company's case, 614, 623.

But on the coming in of the answer of each defendant, the motion to dissolve may be renewed.—*Cross v. Mullikin*, 618.

On the service of an injunction the party if in custody must be discharged; or the personal property, if taken under the *fiery facias*, must be delivered back.—The Cape Sable Company's case, 637.

But the realty which had been so taken under the *fiery facias* may, after the dissolution of the injunction, be sold under a *venditioni exponas*, 638.

INSOLVENCY.

A person who has been finally discharged under the insolvent law cannot, in general, sue or be sued in relation to any property so transferred to his trustee for the benefit of his creditors.—*Hall v. McPherson*, 534.

A discharge under the insolvent law of a party to a pending suit does not operate as an abatement; but the suit becoming thereby defective, the defect must be removed before it can proceed, 538.

INTEREST.

Where a public collector is directed on default to be charged 10 *per cent.*; such interest must be computed to the judgment, and then common legal interest on that aggregate amount until paid.—*Beard v. Williams*, 163.

In general the tenant for life, or particular tenant, must keep down the interest of the debt with which the estate is encumbered.—*Williams' case*, 245.

JUDGMENT.

An absolute judgment against an executor or administrator is conclusive as between the parties to it; but is not so as between such creditor and the heir; yet the heir may, to that extent, obtain reimbursement from the executor or administrator.—*Post v. Mackall*, 499, 519.

A judicial lien, when barred by lapse of time, cannot be revived so as to have a retrospective effect prejudicial to the rights of others.—*Coombs v. Jordan*, 324; *Post v. Mackall*, 517; The Cape Sable Company's case, 660.

Where a judgment has abated by death during the continuance of the lien, the plaintiff, or his representatives, may come in, under a creditor's suit, and have the benefit of such lien without reviving at law.—*Coombs v. Jordan*, 326.

Where the execution of a judgment has been suspended, the lien continues its limited time after such suspension, 328.

The bringing of an action of debt upon a judgment amounts to a virtual abandonment of any then existing lien arising therefrom.—The Cape Sable Company's case, 660.

JURISDICTION.

Where jurisdiction in a particular case has been conferred on the Chancellor, by a special act, he follows the authority exactly as given.—*Hepburn's case*, 96.

An objection to the jurisdiction or to the capacity of the plaintiff to sue, may be presented in any form or at any time.—*Salmon v. Clagett*, 143.

The court can pronounce no decree prejudicial to any public right appearing upon the record.—The Wharf case, 383.

LAND.

How and why real estate was exempted, by the common law, from being taken in execution and sold for the payment of debts.—*Tessier v. Wyse*, 38; *Coombs v. Jordan*, 298; The Cape Sable Company's case, 639.

The personal estate the primary and natural fund for the payment of debts, therefore the realty should not be taken in execution where there is personally present.—*Tessier v. Wyse*, 39, 42; The Cape Sable Company's case, 640.

Escheatable lands may be sold under a creditor's suit, and the proceeds distributed without preference and only among citizen creditors.—*Tessier v. Wyse*, 53.

An instance in which, as it would seem, a fee simple in lands may, by the common law, become assets in the hands of an executor.—*Coombs v. Jordan*, 300.

Land here, before the revolution, considered much more of the nature of commercial property than in England, 302.

An imperfect legal title in the land office considered as a sort of chattel real, 303.

An instance in which lands held in fee simple were sold under an inquisition for the payment of debts, 304.

The statute subjecting lands to be taken in execution and sold, considered and explained, 304, 309.

The land office is considered as the general market in which all public lands are sold.—*Baltimore v. McKim*, 455.

Individuals were not permitted to purchase land of the Indians, 456.

No appeal is allowed from any decision in a caveat case, 457, 462.

In some cases individuals are allowed to acquire a legal title to land from the

state, without going into the land office, 460, 466.

The public lands can only be sold for a valuable consideration, or disposed of with a view to some public benefit, 460.

The extent of the authority to acquire a right to land covered by the tide water of the basin of Baltimore by making improvements thereon, 466.

A patent may be granted for land covered by navigable water, subject to the right of navigation, 467.

So a patent may be granted for land subject to a right of wharf, way, &c. 473.

No title can be obtained from the land office for any thing but land, 473.

All improvements made upon land by any one without right belong to the owner of such land, 472.

Previous mistakes in proceeding under a warrant, may be cured by the payment of the caution money.—*Coursey v. Hemsley*, 458.

Proceedings under a warrant deemed valid, if had according to the then practice of the land office, 458.

Under special circumstances, warrants may be granted to obtain lands for which a proclamation warrant could not be obtained.—*Ross v. Bladen*, 464.

The owner of land bounded by tide water has no pre-emptive right to take contiguous marsh.—*Baltimore v. McKim*, 469.

A right to take out a warrant of resurvey is an incident only of a legal title derived from a patent or of an imperfect legal title under a certificate compounded on.—*Hughlett's case*, 475.

Where the holder of a tract of land by a legal title, by a warrant of resurvey, takes in some contiguous vacancy, and then makes sale of the original tract by its name and description; as the vacancy embraced by the certificate of resurvey, does not thereby pass to the vendee, he cannot obtain a patent upon such certificate, 475.

LIEN.

The origin and nature of a judicial lien which fastens upon all the real estate then held or thereafter acquired by the defendant, from the date of the judgment.—*Coombs v. Jordan*, 293, 300.

A judicial lien never extends beyond the debtor's power of alienation, and in some cases not so far, 293.

In a suit by a bond creditor against the heir, in respect of real assets descended, the lien on such assets commences by relation from the institution of the suit, 302.

A judicial lien can only fasten upon that which is properly denominated real estate, 310.

What is to be regarded as real estate as

between vendor and vendee, mortgagor and mortgagee, 311.

What is to be considered real estate as between landlord and tenant, heir and executor, 311.

What are fixtures, which as a part of the realty are bound by the lien, 311.

Incorporeal hereditaments which may be taken and sold under a *fieri facias* will be bound by a judicial lien, 315.

An equitable interest being liable to be taken in execution is bound by the lien, 319.

As the lien of a judgment at common law arises altogether from the liability of the real estate to be taken in execution, it fastens from the date of such judgment where the liability then exists, 298, 323.

Lands having been made liable to be taken and sold under a *fieri facias* upon a decree in equity, a lien takes effect from the date of such decree as well as from the date of a judgment at common law, 321.

A judicial lien, when barred by lapse of time, cannot be revived so as to have a retrospective effect prejudicial to the rights of others, 324; *Post v. Mackall*, 517; *The Cape Sable Company's case*, 660.

The bringing of an action of debt upon a judgment amounts to a virtual abandonment of any then existing lien arising therefrom.—*The Cape Sable Company's case*, 660.

Where a judgment has abated by death during the continuance of the lien the plaintiff or his representative may come in under a creditor's suit and have the benefit of such lien without reviving at law.—*Coombs v. Jordan*, 326.

Where the execution of a judgment has been suspended the lien continues its limited time after the expiration of such suspension, 328.

Lien in its proper sense is a right which the law gives; although it is usual to speak of lien by contract.—*Ridgely v. Iglehart*, 542.

Of liens given by the common law, by equity, by marine law, by statute, and by contract, 542.

The lien given by the act to direct descents repudiates every thing like an equitable lien, and can only be enforced at common law as a statutory lien incident to the bond with which it has been blended, 547.

Where under the act to direct descents, one of the heirs, under an order of sale purchases the whole, and gives bond with another heir as his surety, the lien of the bond is exclusive of the interests of such obligors, 549.

Where one heir sues upon such bond and obtains judgment, and by virtue of an

execution thereon has the land bound by such statutory lien taken and sold, he thereby extinguishes his lien, 549.

There can be no lien on lands lying beyond the direct or indirect range of an execution from the court in which the judgment is rendered.—The Cape Sable Company's case, 633, 660.

But now and here the judgments and decrees of the County Courts, the Court of Chancery, and the Court of Appeals give a lien upon the lands of the defendant every where within the state, 633.

Where the parties have acquiesced in having real and personal property mingled and indiscriminately sold, the judgment creditors must be allowed the benefit of their lien, as if the whole proceeds of the sale arose from the sale of the realty only, 660.

LIFE INTERESTS.

The various cases in which it may become necessary to put a present value upon a life interest in property.—Williams' case, 221.

The early adjudications in relation to this matter, 222.

The formation of tables shewing the expectation of human life at every age, by whom and where made, 227, 235, 238.

The expectation of life differs according to place, class and sex, 228.

The expectation of life and also of marriage, 236.

In ascertaining the present value of a life interest, and in apportioning a burthen between the tenant for life and the remainderman or reversioner, the estimate must be made from a consideration of all circumstances; and in making the estimate much assistance may be derived from tables shewing the expectation of life, 240, 244.

In general the tenant for life must keep down the interest of the debt with which the estate is encumbered, 235.

The census of this and other countries as shewing the increase of population, and the expectation of human life, 246, 250.

The expectation of life of the African race in our country in most situations, greater than that of the white race, 251.

The mode of ascertaining the present value of a life interest in some of the states of the Union, 252.

The assessment laws and the constitutional rule which requires every one to contribute his proportion of public taxes according to his actual worth in property, considered with reference to the valuation of life interests, 253, 264.

Can any property be exempted from taxation, 256.

The legislative rule and the rule of the court whereby the value of dower and

other life interests are to be ascertained, 264, 275; *Cassanave v. Brooke*, 267; *Greenwood v. Clarke*, 268.

The errors of the rule of this court, and of the legislative rule whereby the value of dower is adjusted, 275, 281.

The rule for adjusting the value of dower, and of other life interests, 282.

The valuation of a life interest should be made as of the day when it is taken away, 282.

Where a life interest has been extinguished, its equivalent then vests and will pass accordingly like other property, 283.

LUNATIC.

No dilatory proceeding or postponement to be allowed in favour of a lunatic in a creditor's suit.—*Tessier v. Wyse*, 50.

Where a defendant is in custody as a lunatic it is of course for his committee to answer for him; but if the committee be interested then the lunatic must have a guardian *ad litem* appointed.—*Hewitt's case*, 184.

The court may order a part of a lunatic's real estate to be sold for his maintenance and the payment of his debts.—*Williams' case*, 192.

On a petition and affidavit, that a certain person is of unsound mind, a writ *de lunatico inquirendo* may be issued.—*Morgan's case*, 332.

A trustee of a lunatic may decline to continue to act as such, 333.

No one should be appointed trustee of a lunatic who is not a resident of the state, 335.

Where there is a doubt as to the soundness of mind of one who has been declared a lunatic, he should be apprised of the fact, 335.

A lunatic's runaway slave, who has been apprehended, may be sold and the proceeds invested for the benefit of the lunatic, 336.

A defendant shewn to be of unsound mind may have a guardian *ad litem* appointed to answer for him without a writ *de lunatico inquirendo*.—*Post v. Mackall*, 488.

MONEY.

Before the revolution there was a *legal* money of account of six shillings to the dollar, and a *current* money of account of seven shillings and sixpence to the dollar; but the accounts of executors and administrators were required to be adjusted in *legal* money.—*Hepburn's case*, 105.

MORTGAGE.

Where the debt is payable by instalments, the mortgage may be foreclosed after the first payment becomes due.—*Salmon v. Clagett*, 179.

An injunction may be granted to protect the mortgaged property before the debt becomes due, 180.

A sale, instead of a foreclosure of an infant's mortgaged estate, must always be for his benefit.—*Williams' case*, 194.

In a decree for the sale of a mortgaged estate, the mortgagor must always be allowed time to pay the debt before a sale.—*Jones v. Betsworth*, 194.

But the allowing of further time by the decree to the mortgagor to pay the debt, seems to be unjust.—*Williams' case*, 196, note.

The tacking of one claim to another is never allowed, to the prejudice of other creditors.—*Coombs v. Jordan*, 330.

A mortgagee in possession may be allowed for lasting improvements.—*Neale v. Hagthorp*, 590.

NUISANCE.

The natural condition of certain land declared to be a nuisance, which the owner of the soil was required to remove.—*The Wharf case*, 376.

A gunpowder manufactory not a nuisance because of the loose manner in which the edifices have been constructed.—*The Bellona Company's case*, 447.

PARTITION.

This court has jurisdiction to make partition of real and personal estate; but if the personalty be in the hands of the executor or administrator it should be distributed under the authority of the Orphans Court.—*Hewitt's case*, 185.

PARTNERSHIP.

Partnership debts must be first paid out of the joint estate; and the separate debts first paid out of the separate estate.—*Simmons v. Tongue*, 356.

A partnership may be dissolved by the act of God, as by insanity; by the act of the government, as by a war between the countries of the partners; or by some of the members becoming a body politic.—*The Cape Sable Company's case*, 674.

PLEAS AND PLEADING.

Where the purchase money of land is the consideration of several bonds, the contract is so entire, that if the consideration be shewn to be insufficient by any one defendant, such defence will enure to the benefit of all others, even as against whom the bill might otherwise have been taken *pro confesso*.—*Walsh v. Smyth*, 16.

But where there is a ground of relief available by all the plaintiffs obligors, any of them may waive the benefit of it without affecting the others, 25.

A demurrer or a plea may be said to answer the bill; but they are not that kind of answer which it calls for.—*Salmon v. Clagett*, 135.

A demurrer or plea only supposes the facts stated in the bill to be true; and therefore such facts cannot, in another case, be given in evidence as admissions of the defendant, 135, 140.

A demurrer supposes the facts stated in the bill to be true; but avers, that they constitute no ground of relief, 135.

A plea supposes the facts set forth in the bill to be true; but states other facts which displaces the equity; or it affirms the legality of that which is impeached by the bill, 135, 147, 149.

The form of an incongruous plea with an answer in its support.—*Bissett v. Bissett*, 135, note.

After a plea has been overruled, the defendant may be examined on interrogatories to supply the defect.—*Salmon v. Clagett*, 147.

A demurrer or a plea may be amended or ordered to stand for an answer, 148.

The cases which consider any matter in avoidance embodied in an answer as operating like a plea make a new use of an answer which cannot be allowed, 149, 158.

The nature of a bill of discovery.—*Price v. Tyson*, 397.

A defendant, in answering a bill of discovery, may set forth any pertinent matter in avoidance, 397.

No matter, stated by way of answer, which affords such information as the bill calls for, or which may be needful as a defence, can be deemed impertinent, 400, 404.

Nor can any matter which is pertinent to the case, be deemed scandalous, 400, 404.

The legality of evidence brought out by a bill of discovery, must be determined by the court of common law for whose use the discovery was made, 405.

PORT.

The nature of a public sea-port.—*The Wharf case*, 369.

In all public ports there are rights affecting commerce, internal government, and private property, by which the title to and use of a wharf therein must be controlled, 371.

PRACTICE.

Where the contract is entire, a good defence going to the whole, by one defendant must enure to the benefit of all, even those against whom the bill might otherwise have been taken *pro confesso*.—*Walsh v. Smyth*, 16.

But where there is a ground of relief available to each of several plaintiffs,

- any of them may waive the benefit of it without affecting the others, 25.
- A supplemental bill is a distinct record : but an original and amended bill are considered as one entire record, 20.
- The nature and effect of an amendment, 20.
- No amendment can be made without leave ; if short, it may be made by an interlineation ; but, in general should be made by a separate bill, 21.
- The prayer of a petitioner cannot be regarded farther than his rights may be injuriously affected, 21, 26.
- On an application for a rehearing it is not enough to shew that injustice has been done, but that it has been done under circumstances which authorize the court to interfere, 27.
- The old form of a decree setting forth the whole case as it appeared to the court.—*Anderson v. Rawlins*, 41.
- A creditor's bill need not allege and shew an insufficiency of the personalty in order to have a sale of the realty, that being an equity between the heir and executor.—*Tessier v. Wyse*, 43, 49.
- Where the then defendants are entitled to both personal and real estate, the personal representative of the deceased debtor need not to be made a party, 57.
- The mere fact of an infant's having attained his full age is not a ground for a rehearing in a creditor's suit, 61.
- An interrogatory, in the nature of a cross bill, propounded by a defendant to a plaintiff, answered by the monosyllable, yes.—*Salmon v. Clagett*, 130.
- It is necessary in all doubtful cases to recur to the reason of the law.—*Salmon v. Clagett*, 134.
- There are five modes of defence ; 1, a demurrer ; 2, a plea ; 3, an answer, properly so called ; 4, a matter in avoidance in the form of an answer ; and 5, a defence found at the hearing as the production of the whole case, 142.
- The cases which consider any matter in avoidance embodied in an answer as operating like a plea make a new use of such an answer, which cannot be allowed, 149, 153.
- On an affidavit at the hearing, of a misapprehension in taking evidence, or that a material witness has just returned, or been discovered, the case may be continued with leave to issue a commission, 166, 167.
- Where a defendant is in custody as a lunatic, it is of course for his committee to answer for him ; but if the committee be interested, then the lunatic must have a guardian.—*Hewitt's case*, 184.
- Under a decree for a sale the trustee may reserve a bid or have a bye-bidder in certain cases.—*Williams' case*, 212.
- The actual holder of the estate may be ordered to pay an occupation rent pending the litigation, 216.
- In a creditor's suit the auditor should arrange the claims in classes.—*Simmons v. Tongue*, 353.
- On exceptions for impertinence, scandal, or insufficiency, a day is appointed for hearing before the Chancellor.—*Price v. Tyson*, 400.
- The plaintiff pays the costs of a bill of discovery, 406.
- But the defendant to a bill of discovery made to pay the costs of exceptions for insufficiency, 406.
- If the plaintiff brings on the case for hearing on bill and answer, he thereby admits the answer to be true.—*McKim v. Odoin*, 409.
- The bill dismissed as to some of the defendants, and relief granted against others, 410, 432.
- After an appeal had been taken, the plaintiff, on dismissing his appeal, allowed to amend his bill, on which a new injunction was granted on terms, 413.
- There can be no substituted service of a *subpœna* to answer an amended bill upon a solicitor, as against a resident defendant, 430.
- Attorneys allowed five *per cent.* for suing for, and collecting the proceeds of sales under a decree.—*Post v. Mackall*, 528.
- On the filing of a bill the defendant may instantly put in his answer so as thereby to prevent the granting of an injunction.—*Hall v. McPherson*, 531.
- As by a decree to account, the defendant becomes an actor, the plaintiff cannot thereafter dismiss his bill without notice to the defendant by a rule further proceedings, 533.
- A discharge under the insolvent law of a party to a pending suit does not operate as an abatement ; but the suit becoming thereby defective, the defect must be removed before it can proceed, 538.
- The various modes in which a bill may be taken *pro confesso*.—*Neale v. Hagthorpe*, 570, 575.
- Statements in a bill or answer as to agreements with persons not parties to the suit, the nature and validity of which agreements are not drawn in question, and all careless verbiage may be rejected as mere surplusage, 566, 580.
- A citizen can only be sued or arrested by civil process in the county in which he resides ; but may be taken by an attachment from the Court of Chancery any where within the state.—*The Cape Sable Company's case*, 664.
- Cases consolidated by the manner of treating them, or by consent, 623, 626.

PRINCIPAL AND SURETY.

If the creditor does any act by which the peril of the surety is increased, or his means of reimbursement is postponed or impaired, the surety will be discharged.—*Salmon v. Clagett*, 173.

A surety, on paying the whole debt, has a right to be subrogated to all the rights and securities of the principal, 173.

But if there be an express reservation of all the creditor's remedies, the surety will not be discharged, 173.

Where a creditor neglects, on being actually notified to come in under a creditor's suit, against the estate of the deceased as his principal debtor, such debtor's sureties will be discharged.—*Simmons v. Tongue*, 354.

If a creditor, by his conduct, has rendered a security in a foreign state unavailable, to the prejudice of the surety, he will be thereby discharged.—*Post v. Mackall*, 516.

PROCESS.

It is the duty of the sheriff to execute all process and orders issuing from this court.—*Deale v. Estep*, 438.

A summons or *subpoena* issued by commissioners requiring a witness to attend and testify before them, under a commission to take evidence, is a process which must be served by the sheriff, 439.

For the service of all process which a sheriff may be required to serve, he is entitled to have his legal fees allowed and taxed as a part of the costs, and may enforce payment accordingly, 439.

A citizen can only be sued or arrested by civil process in the county in which he resides; but may be taken by attachment from the Court of Chancery any where within the state.—*The Cape Sable Company's case*, 664.

PUBLICATION.

The proceeding by publication, on the ground that the defendant does not reside in the state, does not apply to those cases, such as mariners, who are temporarily absent in their vocation.—*McKim v. Odom*, 415, 429, 431.

SALES UNDER DECREE.

In sales under a decree, the court never warrants a title.—*Wampler v. Shipley*, 183.

On a sale by the acre, the quantity is ascertained by a survey, 183.

The trustee cannot abandon any right or dispose of the purchase money in any way without the previous sanction of the court, 183.

Where the widow herself is the petitioner as guardian of her infant children for the sale of their real estate, her separate assent not necessary.—*Williams' case*, 210.

A bid may be reserved, or a bye-bidder allowed in certain cases, 212.

An estate ordered to be sold is under the protection of the court, and may be rented, and the buildings kept in repair until a sale can be effected, 215.

Where the plaintiff creditor is the purchaser, he need only pay the commissions and costs, with the balance if any.—*Jones v. Betsworth*, 195, 197, note.

The trustee may be ordered to convey the estate to the assignee of the purchaser; provided the assignment has been fairly made.—*Hanson v. Chapman*, 199; *Simmons v. Tongue*, 345.

The bonds taken for the purchase money may be assigned in satisfaction to those entitled to the proceeds of the sale.—*Kitty v. Quynn*, 213.

The actual holder of the estate may be ordered to pay an occupation rent pending the litigation.—*Williams' case*, 216.

The administrator and heir of a deceased purchaser ordered to pay the balance of purchase money.—*Coombs v. Jordan*, 287, 295.

The estate ordered to be re-sold to pay the balance of the purchase money, 288, 289.

A purchaser under a decree is not bound to see to the application of the purchase money, 329.

After the sale has been ratified, and the purchase money has become due, the purchaser and his sureties may be ordered to pay; and, on their failing to do so the land may be re-sold at the risk of the purchaser.—*Simmons v. Tongue*, 346, 347.

By consent the commission of the trustee given to the widow, 348.

Attorneys allowed 5 per cent. for suing for and collecting the proceeds of the sales under a decree.—*Post v. Mackall*, 528.

SHERIFF.

The sheriffs, for the time being, of the several counties are the executive officers of this court; and as such amenable to it.—*Deale v. Estep*, 438.

It is the duty of the sheriffs to execute all process and orders issuing from this court, 438.

A summons or *subpoena* issued by commissioners requiring a witness to attend and testify before them under a commission to take evidence, is a process which must be served by the sheriff, 439.

For the service of all process which a sheriff may be required to serve, he is entitled to have his legal fees allowed and taxed as a part of the costs; and may enforce payment accordingly, 439.

STATUTE OF LIMITATIONS.

The lapse of years cannot fail to give rise to an unanswerable presumption against the validity of an antiquated claim of any kind.—Hepburn's case, 110.

The statute of limitations must be pleaded or specially relied on; but a presumption of satisfaction arising from lapse of time, may, without putting it as a defence upon the record, be taken advantage of at the hearing, 110.

Lapse of time is a defence available against the state, and may be taken advantage of by it, 111.

A presumption of satisfaction rests on two facts; first, that the creditor had a remedy; and secondly, that the debtor himself was or had property within reach of that remedy, 112.

Lapse of time may be relied on in the answer, or taken advantage of at the hearing.—Salmon v. Clagett, 142.

After the lapse of three years, a judgment is presumed to be satisfied, so that no execution can be issued thereon.—Coombs v. Jordan, 324.

A judicial lien when barred by lapse of time cannot be revived so as to have a retrospective effect prejudicial to the rights of others, 324.

When relied on in general terms, in a creditor's suit, is applied according to the nature of the claim; is only to prevail as it may apply to the representatives of the realty or personalty; and runs up to the time of filing the voucher.—Post v. Mackall, 498; *McCormick v. Gibson*, 509.

A plea of limitations can be received only from him who has something to protect by it; and enures only to the benefit of him who relies on it.—Post v. Mackall, 499, 525; *McCormick v. Gibson*, 500, 507; *The Cape Sable Company's case*, 672.

The effect of an endorsement of a partial payment in taking a case out of the statute.—Post v. Mackall, 522.

The mode of distribution, in a creditor's suit, where there are conflicting pleas of limitation, 525; *McCormick v. Gibson*, 509.

The distinction between simple contract and specialty debts as regards the statute of limitations.—Post v. Mackall, 520.

An acknowledgment of a debt will not be sufficient to take a case out of the statute, if there be any collusion.—*The Cape Sable Company's case*, 673.

TAXES.

The constitutional rule of taxation, its meaning and application.—*Williams' case*, 254, 260.

A poll tax, its nature and operation, 254.

The exemption of paupers; who is a pauper, 255.

The constitutional equality must mean a practicable approximation to actual equality, 257.

No property can, constitutionally, be exempted from taxation, 257.

The early tax laws considered and compared, 260, 264.

A toll for the use of a wharf, market, or road, is in the nature of a tax which cannot be levied without the express sanction of the General Assembly.—*The Wharf case*, 375, 350.

TRUST.

A trustee appointed by a decree to sell cannot abandon any right, or dispose of the purchase money in any way without the previous sanction of the court.—*Wampler v. Shipley*, 182.

Under a decree for a sale the trustee may reserve a bid, or have a bye-bidder in certain cases.—*Williams' case*, 212.

The administrator of a deceased trustee under a decree ordered to bring into court the bonds, the purchase money, and to account.—*Coombs v. Jordan*, 287, 295.

By consent of the trustee, his commission given to the widow.—*Simmons v. Tongue*, 348.

The nature of resulting trusts in what cases they arise.—*Neale v. Hagthorp*, 582.

A new trustee appointed in place of one who never consented to act as such under the deed, or in the prosecution of the suit.—*The Cape Sable Company's case*, 627.

VENDOR AND VENDEE.

Where the purchase of land is the consideration of several bonds the contract as to them is entire an indivisible.—*Walsh v. Smyth*, 15.

In sales under a decree the court never warrants a title.—*Wampler v. Shipley*, 183.

After a sale under a decree the trustee may be ordered to convey the estate to the assignee of the purchaser.—*Hanson v. Chapman*, 199; *Simmons v. Tongue*, 345.

A purchaser for a valuable consideration without notice will not be disturbed—what is notice.—*Neale v. Hagthorp*, 586.

WASTE.

A decree for a sale virtually puts the estate under the protection of the court, after which an injunction may be granted to stay waste.—*Tessier v. Wyse*, 60; *Williams' case*, 215.

An injunction may be granted to stay waste on the mortgaged estate before

the debt becomes due.—*Salmon v. Clagett*, 180.

An injunction to stay waste, there being no then depending suit to try the right, dissolved on the coming in of an answer which denied the trespass and alleged that the acts complained of were done on his the defendant's own land.—*Stewart v. Chew*, 441.

WHARF.

The city collector of wharfage may be directed to keep a separate account of the wharfage for the use of certain wharves until the right to them can be determined.—*The Wharf case*, 361, 367.

In all public ports there are rights affecting commerce, internal government, and private property, by which the title to and use of a wharf therein must be controlled, 371.

No wharfage can be allowed which contravenes any congressional regulation of commerce, or the free intercourse and equal rights secured by the federal constitution, 371, 374.

Wharfage or anchorage may be charged

for the use of any place held as mere private property to which a vessel may come, 375.

A wharf in a public port is a kind of highway, for the use of which, after it has been once dedicated to the use of the public, no toll can be charged, unless allowed by the Legislature, 375.

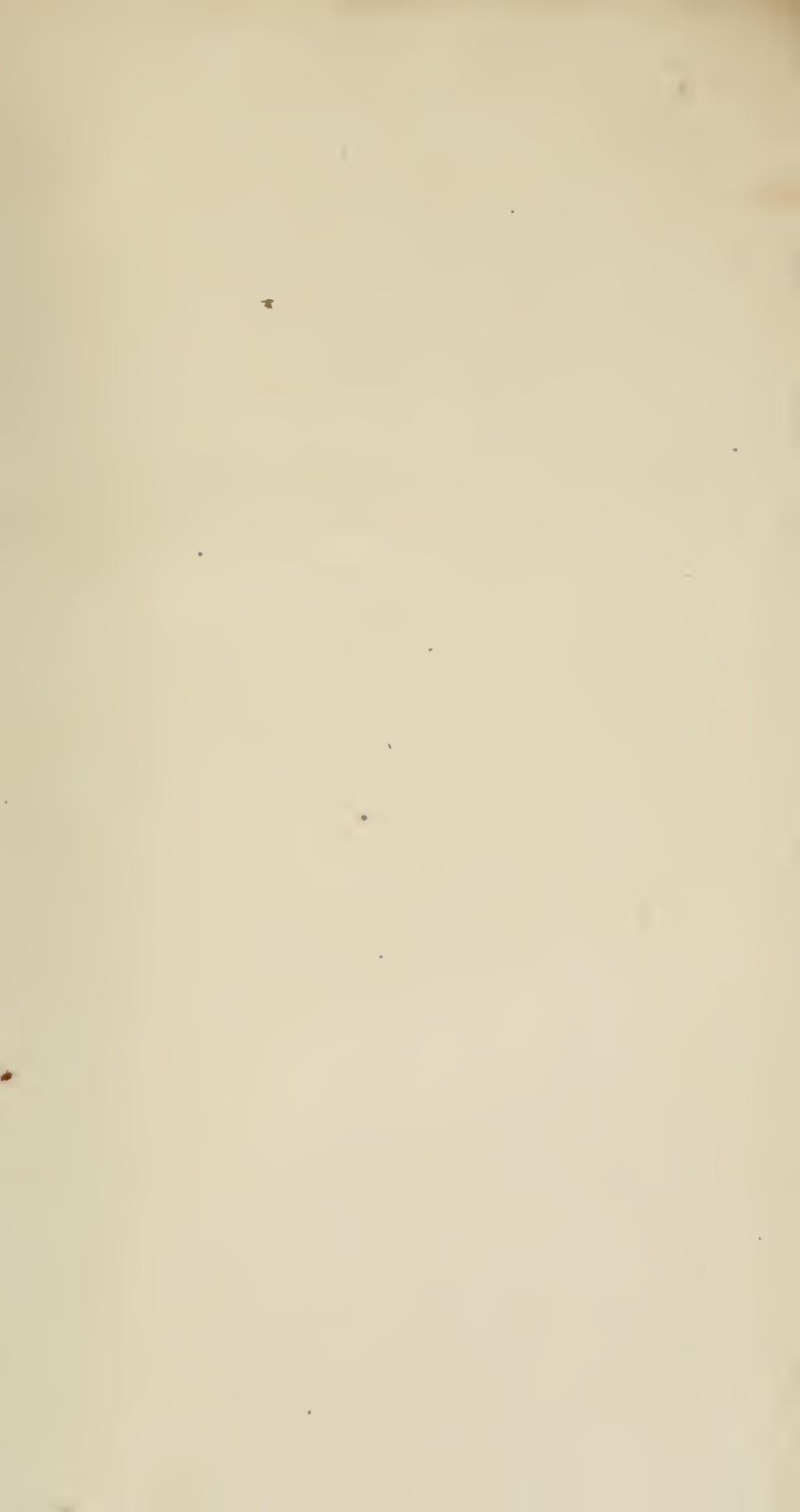
Wharfage where allowed must be reasonable, and when fixed cannot be enhanced, 374.

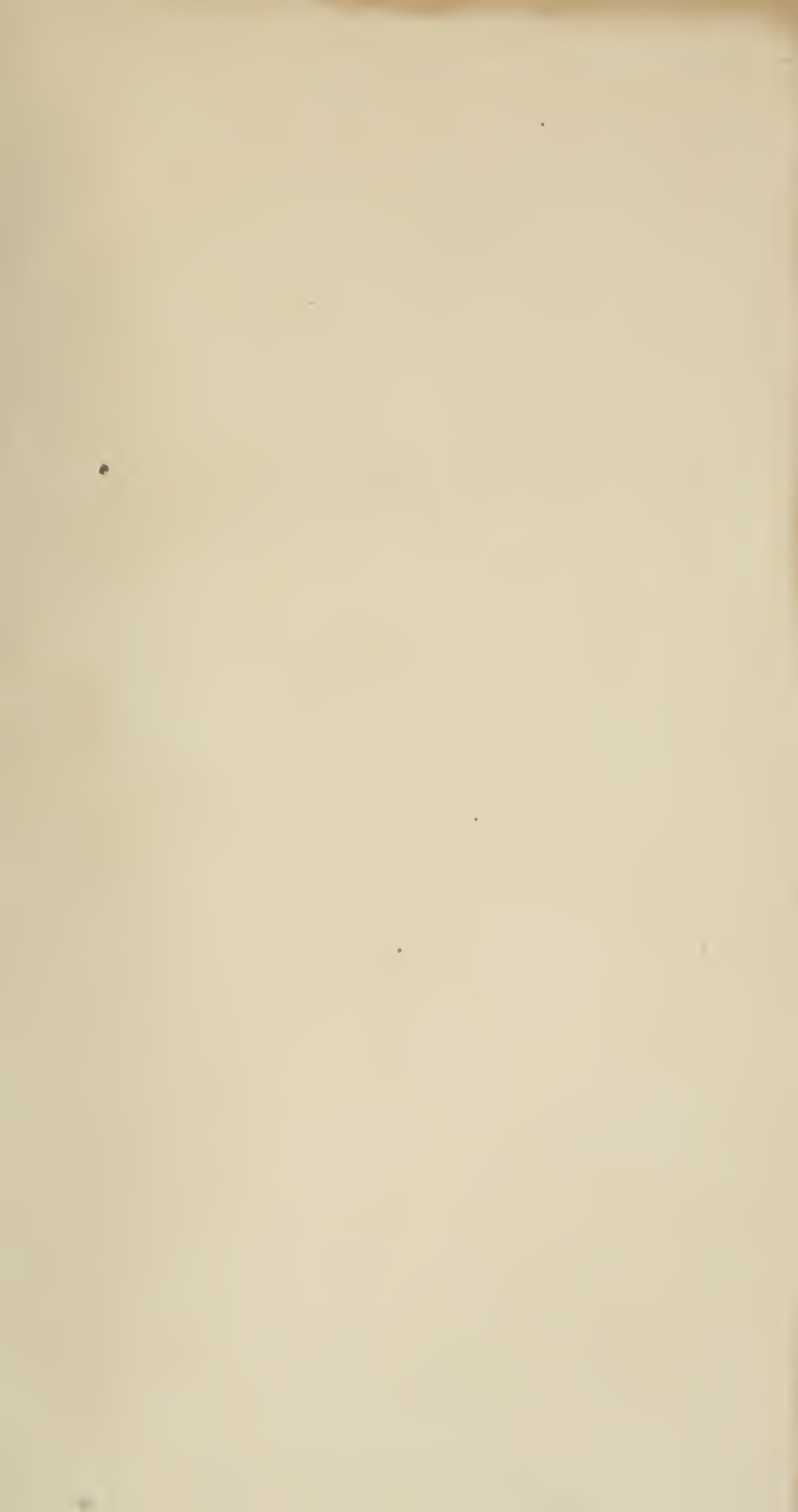
Where each of the litigating parties claims a right to wharfage for the use of a public wharf, for the use of which no toll can be demanded, they must both of them be perpetually enjoined from collecting wharfage, 380, 384.

WILLS.

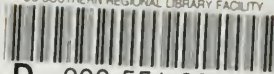
The original copy of a will of real or personal estate, when proved and lodged with the Register of Wills, cannot be taken from his possession; except under special circumstances.—*Randall v. Hodges*, 477.

A probate cannot be granted here upon a copy of a will from another state, 481.





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